

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,

vs.

WALTER McDONALD,
Appellee.

WALTER McDONALD,
Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern
District of California, Southern Division

C. A. No. 24885-S

In the Matter of

WALTER McDONALD,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden United States
Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Walter McDonald respectfully
shows:

That he is illegally restrained of his lawful liberty
by color of authority of the United States and in the
immediate custody of James A. Johnston, Warden
of the United States Penitentiary, Alcatraz, Cali-
fornia, which penitentiary is within the legal juris-
diction of this court.

STATEMENT OF FACT

Petitioner, on May 4, 1938, in the United States
District Court for the Eastern District of Michigan,
was indicted on six counts for violation of Title 12,
Section 588B, subsections (a) and (b); all of which
comprise a single charge of bank robbery.

On January 25, 1939, petitioner was tried by
jury and found guilty. On January 26, 1939, he

was sentenced to the penitentiary in the custody of the Attorney General of the United States and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner was deprived of his constitutional right to the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner is falsely, erroneously and unjustly charged with a very serious offense of which he is wholly innocent. Being ignorant in law and, during his trial, deprived of his constitutional right to the assistance of counsel, which necessarily precluded the right of appeal, petitioner was unable to establish his innocence.

Petitioner was notified by the court on Monday evening January 23, 1939, that his trial would start the following morning. He had no funds to employ counsel and the court would not appoint counsel; in support of which is an authentic copy of a letter incorporated within a sworn deposition by Honorable Judge Moinet, on page 13 thereof, attached hereto, made a part hereof, and marked petitioner's exhibit A.

On the evening preceeding his trial petitioner learned that one Attorney George F. Curran had filed with the Court Clerk his notice of appearance as defense counsel on [2*] January 10, 1939. This

*Page numbering appearing at foot of page of original certified Transcript of Record.

was without the consent, knowledge or notification of petitioner; in support of which is an authentic copy of a sworn deposition by Attorney George F. Curran, at line 30, on page 14 thereof, attached hereto, made a part hereof, and marked petitioner's exhibit C.

Petitioner thought at the time that the court had appointed this attorney to defend him. He promptly requested him to withdraw from the case. This the said attorney refused to do. Ex. C., p. 15, line 12.

The following morning January 26, 1939, when court convened Atty. Curran made a motion for a continuance so that he could prepare a defense; for at no time preceding the trial date had this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Ex. C. p. 15, lines 21 to 26.

Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Ex. A. p. 3, line 24; Ex. C, p. 7, line 24: Ex. C. p. 20, line 28. He explained that this attorney, at that instant, was awaiting trial before the grievance committee of the Michigan State Bar, Ex. B, for professional misconduct; and that petitioner was the prosecuting witness. Ex. C, p. 14, line 12.

This urgent request the court denied, Ex. C, p. 15, line 17, compelling petitioner to proceed to trial

with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense. Ex. C, page 15. lines 21 to 26.

CONCLUSION

Petitioner having been denied the Assistance of counsel for his defense in contravention of Amendment Six, United States Constitution, the trial court lost legal jurisdiction, of said cause by reason thereof, during the proceedings. Therefore the judgment of conviction is invalid, void and of no effect, and petitioner is now unlawfully deprived of his liberty.

PRAYER

Wherefore, petitioner prays this Honorable Court for a writ of habeas corpus to the respondent herein, Warden James A. Johnston, commending him to release petitioner forthwith from further unlawful custody. And petitioner will ever pray.

WALTER McDONALD

Petitioner Pro Se

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald who, after being first duly sworn, upon his oath deposes and says, that he is the petitioner in the above entitled cause; that he has read the contents

thereof; and that they are true to the best of his knowledge and belief. [3]

(Signed) WALTER McDONALD

Affiant and Petitioner

Subscribed and sworn to before me this 4 day of June 1945.

(Signed) E. J. MILLER,

Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1930, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Walter McDonald Is a Citizen of the United States. [4]

EXHIBIT A

The Deposition of the Honorable Edward J. Moinet, United States District Judge, Eastern District of Michigan, Southern Division, taken on behalf of the Respondent, pursuant to attached agreement, before A. W. Estabrook, shorthand reporter, and Malcolm Shaw, Deputy Clerk of the Court, duly authorized and empowered to administer oaths, on Thursday, June 26, 1941, at three o'clock P. M., in the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, appearing on behalf of Respondent. [5]

Exhibit "A"—(Continued)

EDWARD J. MOINET,

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Deputy Clerk of the Court, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name, please?

A. Edward J. Moinet.

Q. Where do you reside?

A. Detroit, Michigan.

Q. What is your occupation and profession?

A. United States District Judge for the Eastern District of Michigan.

Q. How long have you been United States District Judge for the Eastern District?

A. Since June 13, 1927.

Q. And at the present time you are District Judge of that district?

A. I am one of the five.

Q. Judge, do you recall the cases of Otto Barnowski and Walter McDonald, which were tried in 1939 in your Court, wherein Barnowski and McDonald were charged with violation of the law, with robbery of National Banks?

A. What is the question, do I recall?

Q. Do you recall it?

A. I do; the case was tried before me.

Q. Judge, is it your custom to take notice of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the various cases that you try, your own personal notes? A. I do.

Q. And you have those notes here with you, do you, Judge? A. I have.

Q. Judge, without asking you detailed questions about the case, I would like to have you state in the record what your notes show in connection with the case, generally.

A. My notes show the title of the cause, and the number, and the attorneys, United States attorneys appearing for the Government and [6] the attorney appearing for the defendants; the drawing of a jury, and the number of challenges and the names of the jurors excused; the opening statement of counsel for the Government and the opening statement of counsel for defendants; and the names of all of the witnesses sworn by the Government and for the defendants, and notes of their evidence as given.

Q. Now, Judge, do you recall, on the opening day of the trial, do you recall whether or not an attorney named George F. Curran appeared on behalf of both these men in your Court?

A. I do, and the order showed that he had entered his appearance, right in the file, there, with the Clerk of the Court, as attorney for the defendants, for each defendant.

Q. Now, in connection with Mr. Curran being attorney for the two petitioners, who were the defendants in your Court on the opening morning of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the trial, was any request made to you, Judge, by either McDonald or Barnowski, that you appoint new counsel for them? A. There was not.

Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request?

A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to the particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not. [7]

Q. Had anything been said in the Court that morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock.

Q. Now, Judge, I believe that prior to the day of the opening of the trial of Barnowski and McDonald in Michigan, they had also been arraigned before you some time prior to that on the complaint, due to the fact that, as I understand it, Mr. Hurd, the Commissioner, was out of the state and on sickness in Florida, is that right?

A. Yes.

Q. And at that time, the time they were arraigned on that complaint, did Mr. George Curran appear before you on that hearing?

A. He appeared before me serving as a Commissioner, and that was when, that was a long time before the trial, several months before the trial.

Q. You had had no complaint, no formal written request from either Barnowski or McDonald requesting the appointment of counsel, had you, at any time?

A. I had not.

Q. Now, in connection with Mr. Barnowski, on the morning that the trial opened, did Mr. Barnowski make any statement whatever to you about his difficulties, or any difficulties with Mr. Curran?

A. He did not; there was no claim made that there was any difficulties between Barnowski and the counsel.

Q. So that I take it that on the morning of

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the trial, you had no personal knowledge or other information was furnished you by anybody to the effect that there was any personal difficulties between Barnowski and his counsel Curran?

A. No sir.

Q. And the only statement that was made in court in your presence as to any difficulties that McDonald had with Curran was, as you have already testified, the mere statement that there had been difficulties? [8]

A. Yes.

Q. No explanations were offered and no formal motion for continuance was asked at that time?

A. No.

Q. And no formal motion for appointment of new counsel was asked by either petitioner?

A. No, sir.

Q. Now, Judge Moinet, the petitioner having—

A. (Interposing). Well, wait a minute. There was no request ever made to this Court by either of the defendants or by their counsel that the government procure for them certain witnesses or subpoena and bring into Court certain witnesses. Also, Mr. Curran proceeded to try the case; the defendants swore and introduced the testimony of eight witnesses in their defense; that defense applied to both defendants as to their whereabouts upon the day in question, at or about the time it was alleged the bank was robbed, and the matter was thoroughly argued to the jury, both by the government and by the defendants' counsel Cur-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

ran; and so far as I am able to observe Mr. Curran tried this case in a very able manner, and seemed to use his very best efforts in presenting the defense for the defendants.

Q. And during the course and progress of this trial were any complaints made to you by either defendant as to the conduct of their counsel throughout the course of the trial?

A. There was not.

Q. Was there any information given you that the defendants requested that any witnesses be subpoenaed at the expense of the government?

A. There was not, and if they had made that request and shown their inability to procure such witnesses, I would have made an order that those witnesses be subpoenaed and presented in Court at the expense of the government.

Q. And if any information had been conveyed to you on the morning that Court opened in the trial of the case to the effect that either of these petitioners had personal difficulties with his counsel or had stated to the effect that they could not proceed with that counsel, would you have granted them a continuance or at least looked [9] into the matter with the idea of appointing new counsel for them?

A. If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satisfied that their difficulties were of such a nature

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel.

Q. And as I take it from your testimony, there was nothing whatever that was said in the Court Room that morning, and no statement made by either petitioner or by their counsel that gave you any indication or idea that any such situation existed between them and counsel? A. No, sir.

Q. Judge Moinet, in the District of Kansas, McDonald testified in substance as follows:

He testified that on the opening of this case he arose in open court in the morning and stated in substance that he had had difficulties with his counsel. That you, in answer to that question, asked Mr. Babcock if Mr. Curran appeared formally as counsel. Mr. Babcock in reply to this question, stated that Mr. Curran had formally filed his appearance. Mr. McDonald further stated that on hearing Mr. Babcock say this, then you said, 'The trial will proceed.'

Mr. McDonald then says that upon your saying that the trial will proceed, that he, the petitioner McDonald, rose and said further, in substance, to you, that he had personal difficulties with his counsel, Mr. Curran, in that he had filed, he, McDonald, had filed charges with the State Bar Association of Michigan against Curran, and that he and Cur-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

ran—that Curran could not competently represent him, and he stated further that he then formally asked you to appoint other counsel.

Judge, did Walter McDonald make those statements to you in open court on the morning that the trial convened? [10]

A. He positively did not. The subject was never mentioned.

Q. And the first intimation you had of any such statement is my stating it to you here?

A. Today, yes, sir.

Mr. Davis: Judge Moinet, under stipulation filed in the District of Kansas in this case, McDonald, Barnowski, and their counsel appointed in Kansas, and myself, have stipulated that they might file written interrogatories, to be asked of you at the time this deposition was taken. I will ask you questions that they have forwarded to me in pursuance of the stipulation.

Cross Examination

(Interrogatories Read by Mr. Davis.)

Q. Did you receive a letter or letters from defendants McDonald and Barnowski in cause Number 24742? A. Yes.

Q. State in detail the contents.

Mr. Davis: The Government suggests that copies of the letters which you state you have received

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

be made under your supervision and that such copies be attached to the deposition in lieu of the originals.

A. Yes. Well, here they are. (Papers to counsel) Let me say that on September 7, 1938, I received a letter from McDonald while he was confined in Milan jail, copy of which is attached.

On September 18, 1938, I received a letter from Barnowski while he was confined in Milan Jail. That was before the trial, September, 1938, a copy of which follows. On July 29, 1940, I received from Barnowski a letter from Leavenworth, Kansas, copy of which follows.

Mr. Davis: The three letters that you have mentioned and which—copies of which are now incorporated into the record, are those the only letters you have received from these petitioners, Judge?

A. They are.

Mr. Davis: The next question that the petitioners have in their list is this question:

Q. Is it true, as the court records attest, that over 125 cases were [11] given priority over case Number 24742?

A. I don't know as to the specific number. I know that there were many criminal cases pending and many more were accumulating. These criminal cases were being tried as fast as it was possible to dispose of them according to the ordinary business of this court.

Mr. Davis: So that the interest of the public

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

as well as the interest of the defendants in these cases was taken into consideration by the court in disposing of the business, is that true?

A. It certainly was.

Q. Was any motion or formal pleading ever filed by either petitioner that ever came to your attention, Judge, in which they moved the Court for an immediate trial, that is, I am speaking of a formal pleading? A. No.

Q. No such pleading filed. The next question is in regard to the 125 cases. 'If so, do you approve of this preferential practice?'

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial; no proper foundation laid for the 'preferential practice' referred to in the question.

A. There was no preferential practice; the cases were taken up in their ordinary course.

Q. 'If not, why was it permitted?' The answer is already in. Seven. Did either defendant make a statement before sentence was imposed?

A. They did not. The records show that before sentence was imposed they were asked if they had anything to say before sentence was imposed, and they said nothing.

Q. If so, state in substance. You have already answered that. Were they given an opportunity to make a statement? A. They were.

Q. If not, why not. I think that is answered. Eight, is it true that defendant Barnowski wrote

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

you a letter from the Detention Farm in Milan, Michigan, requesting you to appoint counsel for them?

A. I received a letter from him, as already set forth, but he made no request to appoint counsel.

Q. Did you answer that letter?

A. I don't think I did. [12]

Q. If so, when? A. Well——

Q. Your answer was a foregone conclusion. If not, why not?

A. I referred those letters from Barnowski and from McDonald to Mr. Babcock, the Chief Assistant United States Attorney, and was advised by him that these cases would be taken up as soon as it was possible, having in mind the enormous number of cases then pending in this court, and cases prior to this case referred to.

Q. Next question: Is it true that you criticized a friend of said defendants for trying to bring their witnesses to court for them?

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial, no basis laid.

A. It is positively not true and I never knew and I don't know now that any friend brought any witnesses to court for the defendants. There were no requests to charge presented to the court on behalf of the defendants and the court gave a full and complete charge, as is usual in all criminal cases,

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

fully protecting the rights of the respondents upon trial.

Q. Judge Moinet, at the time or shortly prior to the time the case of Barnowski and McDonald was called for trial in your court had the court been engaged in a very extended case involving the Securities and Exchange Act?

A. Yes, I had been engaged in the trial of the Securities and Exchange case and it took up the time of this court for thirteen continuous weeks, a jury trial.

Q. And before that, Judge, had you been engaged in the trial of some litigation involving some drain proceedings? A. Yes.

Q. That were extensive in nature?

A. I have been engaged in different drain proceedings involving the validity of bonds in the sum of six or seven million dollars, in which proceedings the legality of which was challenged by the taxpayers and by the local municipal authorities, and these matters took up the time of the court for many weeks; of which some cases went to the Court of Appeals. [13]

Q. Now, during the extended occupation of the court with these matters, the court has just referred to, at various times had the court had informal discussions with members of the United States Attorney's Office relative to criminal cases that might be pending in the court? A. Yes.

Q. And among those informal conferences does

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the court recall whether or not it had ever been called to his attention that Barnowski and McDonald were anxious or stated that they were anxious or might indicate that they were anxious for an early disposition of their case?

A. Yes; in their letters that they wrote they indicated that they wanted a trial, but their principal contention was that they wanted to be discharged because they hadn't been provided with a speedy trial.

Q. And as I believe the court has already testified that on the morning of the trial there was no formal motion for a continuance nor for the appointment of counsel nor was anything said in the courtroom by either petitioner or by counsel for the petitioners that would give the court any indication or intimation that these petitioners had any difficulties, serious difficulties with their counsel that would not warrant their counsel proceeding with the case?

A. No, on the contrary, there was nothing said that would lead the court to believe that their trouble was of a serious nature and not only that, but the court observed upon the trial of the case that Mr. Curran, their attorney, tried it in a very masterful manner, as a good lawyer; he protected their rights and the examination, cross-examination, and argument to the jury indicated to me that he used his very best efforts on behalf of the defendants.

Q. And when Mr. McDonald arose and said

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

there had been some difficulties with counsel, that was the only statement that was made to the court in open court that morning?

A. It was, at any time, in or out of court.

Q. And the court did not have then, or does not have now, except what you have been told since then, any idea of what the difficulties between McDonald and counsel were?

A. I don't even know now what the difficulties were, or are. [14]

Q. I see. And you did not deny them the continuance because no continuance was asked for on the morning of the trial? A. No.

Mr. Davis: Thank you very much, judge. I think that is all I need to bother you with.

EDWARD J. MOINET.

Subscribed and sworn to before me this 23rd day of July, 1941.

MALCOLM SHAW,

Deputy Clerk U. S. District Court, Eastern Dist.
of Mich. [15]

(Copy)

Federal Building Detroit

September 18th, 1938.

From Otto Barnowski—5597

To Hon. Judge Moinet

Dear Sir:

I, an innocent man and a cripple, have been held at—Milan Detention Farm a period of six months for Bank Robbery.

Exhibit "A"—(Continued)

The witnesses in this case State positively that the robbers were not crippled. The evidence adduced by the—F.B.I. agents confirms this inescapable fact.

The United States District attorney possesses this indisputable evidence yet persistently and unreasonably refuses to grant my release or bring me to trial so that I may prove my innocence.

I understand it is the sole duty of the Court to set date for trial, appoint counsel where defendants are indigent, and otherwise supervise and protect the rights of that defendant when said person's rights are subject to be abused or disregarded.

I justly contend that my constitutional rights have been ruthlessly disregarded.

Therefore I appeal to the Court for instant relief from my unlawfully restraint.

I do not present this letter as a suppliant seeking undeserved preferment or favor—But respectfully request that you protect my rights, as you have pledged by your oath of office, and immediately release me or insist that I be given a trial.

Thus, Justice only I ask of you who has been appointed to dispense it, and whom I am sure, is broad enough to recognize the fairness of my request.

I trust that a reply will reach me at an early date.

I thank you.

Respectfully,

OTTO BARNOWSKI,

Box 1000—5597 Milan, Mich.

Exhibit "A"—(Continued)

(Copy)

September 7, 1938.

Federal Bldg.

From W. McDonald,
Box 1000—5593, Milan, Mich.

Dear Sir:

I was arrested Mar. 28, for Bank Robbery. Of this crime I am innocent.

On May 18, the F.B.I. investigator visited me at Milan. He stated that I should look forward to favorable action within about two weeks. That was over three months ago.

I would thank you for an immediate interview so that you may advise me what to do to gain my release.

It is with great reluctance that I burden you with my individual problems. But I have no funds to employ counsel and no knowledge how to proceed in my present dilemma.

I thank you sincerely for any courtesy you may be pleased to extend.

Respectfully,

WALTER McDONALD. [17]

Exhibit "A"—(Continued)

(Copy)

Leavenworth, Kansas,

July 29, 1940.

Post Office Box 7
Hon. Edward Moinet
Federal Bldg.
Detroit, Michigan.

My dear Judge:

Doubtless you will be surprised at receiving this letter from me, or my assuming the privilege to write but it being a matter of life and liberty to me, I beg of you to spare me enough of your valuable time and undivided attention, to present unquestionable facts furnished by competent Federal Doctors here at Leavenworth prison to more fully aid you in understanding my case more completely in my behalf, viewing it from an unbiased standpoint, as it has not been correctly presented to you to this date.

I am certain "your honor" is too intelligent to be biased, too powerful to be intimidated, too honest to be corrupted, too sincere to be haphazard and too fair to without the truth.

I am very sure you will be more than glad to listen to my plea if you had the least idea I could show you unquestionably that I am innocent of the crime for which I am sentenced. I know I am innocent of the crime, and am sure you will feel better to have all the facts upon which I rely, which I

Exhibit "A"—(Continued)

am now able to produce from the most convincing and the most reliable source.

I shall be glad to have you consider the facts as follow:

You will recall from the facts of the trial, that my conviction was based upon identification made by a lady school teacher who happened to be a customer in the bank at the time of the robbery—All the officials and employers of the bank testified the robbers were masked and this one lady said they were not, and all witnesses including this lady testified that neither of the robbers was crippled.

You will also recall the testimony of the physician Dr. Shallow who furnished evidence of my physical condition. In my opinion it was [18] the testimony of this lady teacher, and the Doctor which caused my conviction.

I can furnish you unquestioned and competent facts by the highest class and most competent physicians in Leavenworth prison, who have stripped me, and fully examined me to their satisfaction, which facts will controvert fully the testimony of both the above mentioned witnesses. If I can do this, I will strip the whole case of all incriminating evidence against me. If these witnesses for any reason gave untrue testimony then I most assuredly should not be deprived of my liberty and freedom, and should go free.

Dr. Shallow who testified in the case regarding my physical condition among other things said I had action in my crippled knee. Absolutely, upon

Exhibit "A"—(Continued)

my word and honor, did not at any time examine me in any manner sufficient to know whether I was crippled or not. My crippled condition is such that I am unable to go to meals and walk in the lines with other inmates, but I am required to enter alone in advance of the others, and to leave in advance of the others.

The rules of this institution will not permit the Doctors to give me written statements, but they advise me that they will gladly give you a full report upon your written request.

If my condition is such that I could not have walked in and out of the bank without anyone noticing it, then the ladies identification must be a gross mistake even how honest she may be in her intentions.

Now Your Honor: I am imploring you, as a dependant citizen of this great and good Government, and as a man who has his freedom taken from him on mistaken identity and erroneous testimony to present to your authentic and unimpeachable statement of the facts regarding my crippled condition, as found by the best legal medical talent in the employ of the Government in Leavenworth prison. It is not new facts discovered, but true facts of which it is my first and only opportunity I have had to furnish in my behalf.

Now, your Honor: I am asking you to please reconsider my case, and in the face of these facts, I ask that you reform your judgment in keeping with this correctly derived at facts, which proves

Exhibit "A"—(Continued)

beyond a reasonable doubt, that Dr. Shallow did not examine me sufficiently to [19] determine my actual condition, and that the lady who identified me, must of necessity, be mistaken entirely in her testimony as affecting my guilt. I am sure my Government through its public servants desires me to have administered to me equal and full justice as the true facts justify, regardless of the time or under the circumstances which same is developed and presented. This being a matter of full life and liberty to me, I truly ask and pray you to communicate with the following named physicians at the U. S. penitentiary at Leavenworth, Kansas, regarding my condition as a cripple.

No time in the past ten years or more have I been able to walk without crutches or a strong walking stick as an aid to support me.

You write to Dr. John W. Cronin and Dr. Root, physicians in the hospital here. I have been advised by officials here to first write direct to you as you have full power as trial judge to reconsider my case and reform your judgment in keeping with the facts presented to you.

This will be consistant with what law and justice require.

I am yours for success and happiness.

OTTO BARNOWSKI,

54616, Leavenworth, Kansas.

P. S. Please excuse pencil, as I am not permitted to use a typewriter. [20]

Exhibit "A"—(Continued)

State of Michigan,

County of Wayne—ss.

CERTIFICATE OF COURT STENOGRAPHER

I, A. W. Estabrook, a Court Stenographer in the County and State aforesaid, do hereby certify that the witness Edward J. Moinet, whose deposition was taken before me on behalf of Robert H. Hudspeth, Warden United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Thursday, June 26, 1941, at the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan, was by the Deputy Clerk of the Court first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said deposition then given by said witness was by me reduced to writing, and when completed, the said deposition was read over by him, the said witness, and subscribed by him in my presence, and that the said deposition is a true and correct transcript of the whole of the testimony so given by the said witness as aforesaid.

I do further certify that the said deposition hereto attached was taken at the time and place mentioned and described in the caption and notice contained in said deposition, and in the notice of said deposition which is hereto attached; and that said deposition was taken for the reason that the

Exhibit "A"—(Continued)

said witness lives at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the deposition aforesaid to the said Court with my own hand, I have sealed up the same, and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said deposition has been retained in my possession since the taking thereof, and until the same was sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said deposition by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division, [21] that the petitioners were not represented by counsel nor present at the time of the taking of the said deposition.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

A. W. ESTABROOK,
Court Stenographer, 733 Majestic Building, Detroit, Michigan.

Detroit, Michigan, July 24, 1941.

Exhibit "A"—(Continued)

CERTIFICATE OF DEPUTY CLERK

State of Michigan,
County of Wayne—ss.

I, Malcolm Shaw, do hereby certify that I am a deputy Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division, and am duly authorized and empowered to administer oaths.

I further certify that on Thursday, June 26, 1941, at three o'clock P.M., in the office of the Honorable Edward J. Moinet, District Judge, Federal Building, Detroit, Michigan, personally appeared before me the said Honorable Edward J. Moinet, a witness produced on behalf of the respondent in the foregoing entitled cause; that the said witness was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause aforesaid; that the testimony then given by the said witness was reduced to writing in the presence of said witness by A. W. Estabrook, a competent court stenographer; that the said testimony was then transcribed by the said A. W. Estabrook, and the foregoing and attached twenty-five (25) typewritten sheets constitute a full, true and correct transcript of the testimony so given by the said witness as aforesaid.

I further certify that after the said testimony had been so transcribed, the same was read over by the said witness who did then and there subscribe and again make oath to the same in my presence. [22]

Exhibit "A"—(Continued)

I further certify that I am not counsel for nor related to any of the parties to the foregoing and entitled cause, neither am I interested in the subject-matter or outcome thereof.

MALCOLM SHAW,

Deputy Clerk, United States District Court for
the Eastern District of Michigan, Southern
Division.

Dated at Detroit, Michigan, July, 1941.

[Endorsed]: Filed July 31, 1941. Howard F.
McCue, Clerk. [23]

EXHIBIT "B"

State Bar of Michigan
General Headquarters
Lansing, Michigan

April 28, 1945.

Mr. Walter McDonald,
Box No. P. M. B. 602,
Alcatraz, California.

Dear Sir:

We have your letter of April 20, and wish to inform you that your complaint against Mr. George F. Curran was filed with this office on November 19, 1938.

The Complaint was heard on March 10, 1939 and the same dismissed.

Yours very truly,
STATE BAR OF MICHIGAN.

By ERNEST WUNSCH,
Secretary of Grievances,
Third Judicial District.

EXHIBIT "C"

The Depositions of George F. Curran and John W. Babcock, taken on behalf of the Respondent, pursuant to attached agreement, before Eugene Karst, a Notary Public within and for the County of Wayne and State of Michigan, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, Appearing on behalf of Respondent. [25]

GEORGE F. CURRAN

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. My name is George F. Curran.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Where do you reside, Mr. Curran?

A. My residence, 3471 Courville Avenue, Detroit, Michigan.

Q. What is your business or profession?

A. I am an attorney, licensed to practice in the State of Michigan.

Q. And do you have offices in the City of Detroit?

A. My office is located at 1701 Ford Building, in the City of Detroit.

Q. And how long have you been admitted to the Bar of Michigan?

A. I have been admitted to the Bar of Michigan since August—no, since September of 1922.

Q. And you are a member of the Bar of the Supreme Court of Michigan? A. I am.

Q. And of what other courts are you a member admitted to practice in?

A. I am admitted to practice in the District Court, United States District Court.

Q. For the District of Michigan?

A. Southern Division; I was admitted in the Southern Division of the Eastern District.

Q. Do you recall the case of Walter McDonald and Otto Barnowski, which was filed in the United States District Court, the Eastern District of Michigan, No. 24,742? A. I do.

Q. Mr. Curran, when did you first know either Barnowski or McDonald—meet them?

A. I first met McDonald approximately a year

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

before they were arrested—I knew McDonald approximately a year before he was arrested on this charge. The charge I am speaking of is the robbery of the Farmington Bank. [26]

Q. And had you ever acted as his attorney prior to the bank robbery charge? A. I had.

Q. On more than one occasion?

A. On two prior occasions.

Q. On two prior occasions; and had you met—when did you first meet Barnowski, if you recall, to the best of your recollection?

A. I am not so sure, but I believe it was just prior to the issuance of the warrant in that Farmington Bank robbery.

Q. Just prior to that time. And were you employed by McDonald and Barnowski to represent them on the bank robbery charges in this district?

A. You refer to the case that was tried?

Q. I refer to the case. I will withdraw the question and ask you this question: Mr. Curran, will you state in your own words your employment by McDonald and Barnowski, and the steps you took in their case, from the first?

A. I was called and advised that Mr. McDonald was in custody of the Detroit Police Department. I contacted Mr. McDonald and arranged, or tried to arrange for his release. He was finally turned over to the Federal authorities on this robbery of the Farmington Bank. During that time I had

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

contact with Mr. McDonald and I appeared at the arraignment before Judge Moinet for him.

Q. At McDonald's request?

A. Yes. He also informed me that a friend of his, Otto Barnowski, had been arrested, and I proceeded to try and effect Barnowski's release. However, the police officers—I believe it was the State Police, Michigan State Police—took Otto Barnowski from the Detroit Police Department out to the Oakland County Jail at Pontiac. And there Barnowski called me through an attorney, Mr. Wilson. He had retained Mr. Wilson to get a writ of habeas corpus for him, and he also wanted me to come out there. I made two trips to Pontiac at Mr. Barnowski's request and filed—when they were just about to release him, some woman identified Barnowski and he was brought down and arraigned on the warrant in this Farmington robbery. I appeared at the arraignment [27] in the Federal Court for him on that matter, which also I believe was before Judge Moinet.

Q. At his request?

A. At his request. I was not paid, and I dropped out of the picture; and when the case came up for trial before Judge Moinet, there was some question as to Barnowski and McDonald wanting me to appear for them.

Q. Now, pardon me, but prior to the date of the trial—we will go back to that—did you make a trip to Milan, the detention farm at Milan, to see Bar-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

nowski and McDonald, prior to the time they were tried in the Federal Court here? A. I did.

Q. Will you state the circumstances relating to that trip and the purpose of that trip?

A. I received a telegram from Walter McDonald, who was then held at Milan, Michigan, the detention farm. Mr. McDonald, in his telegram, stated to me that if I would come out there he would pay me for my trip out there. I went out there and he paid me \$25 for the trip and to apply on past services. The purpose of Mr. McDonald wanting me to come out there was to try and effect an early trial of his case. He had been in custody some months at that time. He wanted me to secure a writ of habeas corpus, and so that he could receive an early trial I came in and I talked with Judge Moinet and also the District Attorney, and was advised that there were other cases, that had been pending prior to McDonald's and Barnowski's case, ahead of us, and just as soon as their case could be reached it would be tried, which they estimated at that time, I believe, was around thirty days. So I didn't secure a writ of habeas corpus, as Mr. McDonald and Barnowski wanted, because I could see as it would serve no purpose.

Q. Mr. Curran, both Mr. McDonald and Mr. Barnowski have testified in this case in Kansas, and both petitioners, in their testimony and in their petition for the writ of habeas corpus herein state in substance that the \$25 they paid you on that oc-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

occasion was for the purpose solely of filing a writ of habeas corpus and was not for the purpose [28] of paying your expenses out to Milan and back, or for past services. What is the fact? What was the \$25 for, Mr. Curran?

A. The \$25 was paid for services that had been rendered and also for the trip. I have the telegram, I believe, still in my files, showing that they agreed to pay me if I would come out to Milan.

Q. If you would come out to Milan?

A. Now, I received no other compensation except the \$25 for my trip to Milan—my expenses to Milan, which took a good half day.

Q. Mr. Curran, if you should be able to find that telegram in your files upon your return to your office, would you forward it to the reporter so it could be attached as Government's Exhibit 1 in this deposition?

A. I am sure I will be able to find it, and I will be glad to give it to you.

Q. Now, Mr. Curran——

A. Wait just a minute. Off the record——

(Discussion off the record.)

A. I am furnishing this on the basis that it is understood that that is not confidential communication between attorney and client, but if the Court who will pass upon these depositions should decide that it is, then it can be stricken.

Q. All right; fine. That is a good way to put it. Now, Mr. Curran, when you were at Milan, and in

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

addition to discussing the habeas corpus case or the early trial of their case, did you have an understanding with McDonald and Barnowski that you would represent them when they were tried, or did they question your representing them when they were tried?

A. Well, it was understood—I can't give you—

Q. What was your understanding of the matter?

A. It was my understanding that I was to try the case, and because of the fact that I had started on the case I was not going to let them down merely because I hadn't been paid.

Q. And did you assume, from the fact that they had wired you to come to Milan and paid your expenses for coming and going, that you were still representing them? A. I did. [29]

Q. Now, did you visit them at Milan on more than one occasion, Mr. Curran?

A. Well, now, I wouldn't say. I remember twice that I was out there, but I wouldn't say I was there three times or not.

Q. Your best recollection is you were there on two occasions?

A. Two occasions, and I may have been there three times; I wouldn't say. Of course, if the records are there, why, that is right.

Q. Yes, I appreciate that. In your appearing for McDonald and Barnowski at the arraignment and on the proceedings up to this point, had you

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

discussed their case generally with them as a lawyer would with prospective clients, or clients, and discussed the merits of their defense, and so forth?

A. We had discussed the case in a general way; we hadn't gone into details as to witnesses who might be obtained. Their contention, of course, was there was not much to discuss, that they knew nothing about the robbery, and that is why I say it was discussed just in a general way, their defense.

Q. Now, Mr. Curran, when did you see these men next; that is, prior to the day they were tried? I believe the trial started in January of 1939. Did you see them, shortly before the trial convened, at the County Jail?

A. I think I saw them a day or two before the trial convened, at the county jail.

Q. And will you state what conversation or arrangements you had with them at that time?

A. Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there.

Q. And when you filed your formal appearance, Mr. Curran—I believe the record will show it was on January 10th, and I believe the trial convened on January 24th—when you filed that formal ap-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

pearance, was it your understanding that you were still acting as attorney for these two men?

A. It was my understanding that I was. While I hadn't been paid, I was willing to go through with it. I had gotten into the picture and I [30] was willing to see it through.

Q. Had you been notified by either Barnowski or McDonald at any time that they did not want your services?

A. The only time that there was any mention of that directly was in Judge Moinet's courtroom the morning of the trial.

Q. Now, before we get to that point, Mr. Curran, did you ask or discuss with Barnowski and McDonald, at the county jail, before they were tried, their case, as to what witnesses they wanted, and so forth, or was any discussion had along those lines?

A. There was some discussion in general: not as to what witnesses they wanted, but in the general discussion of their case. For example, they said they couldn't—in explaining they couldn't be guilty, they said that there was a woman who operated I believe a laundry, who would testify that at the time of the robbery that they were in the laundry, or one of them was, and then the other one was supposed to have been in a garage: but I don't believe the names of any particular people were mentioned. Places were mentioned more than names.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Now, at this time, when you talked to them in the county jail and had this discussion with them as you have related about their case, was anything said by either McDonald or Barnowski that they did not want you to represent them in the trial of the case?

A. I don't remember a thing in the county jail or prior to the trial being said to that effect.

Q. Now, Mr. Curran, state what you recall as to what conversation took place in the courtroom on the morning the trial convened.

A. On the morning the trial convened, I believed the first step was I asked for an adjournment and the Court refused to grant an adjournment. McDonald then got up and walked up to the Bench, and his conversation to the Court, or statement to the Court, was to the effect that there had been some differences between him and myself and that they had filed a complaint with the State Bar of Michigan based upon the fact that I had not obtained a writ of habeas corpus for them, which, as I said before, I didn't feel would have served any purpose, and that was the reason I didn't obtain it; and that they didn't wish me to proceed with the case. The Judge asked me if I had filed an [31] appearance and I stated I had, and the trial Judge stated that the trial would go on.

Q. Now, did you represent them throughout the trial, Mr. Curran? A. I did.

Q. Did you cause any subpoenas to be issued

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

for any witnesses in their behalf, or were any witnesses procured for them?

A. There were witnesses procured.

Q. At your instigation, or how were the witnesses procured, if you recall?

A. Well, that morning they gave me the names and addresses of three or four witnesses that they wanted, and I believe we were able to secure two of those witnesses, and the other witnesses that appeared for them appeared voluntarily.

Q. And did you argue the case, at the conclusion of the case, in their behalf? A. I did.

Q. And after the trial of the case, were you present at the time they were sentenced, if you recall? A. No, I was not.

Q. You were not. Did you file a motion for a new trial for them? A. I did.

Q. Did you argue that motion? A. I did.

Q. Did you consult with them in regard to the filing of a motion for new trial, Mr. Curran?

A. I did.

Q. And after the motion for a new trial was overruled, did you take any steps to perfect an appeal? A. No, I did not.

Q. You did not. Did you have any discussion with Barnowski or McDonald in regard to an appeal?

A. Well, there was some discussion as to appealing, but it was based upon the fact that Barnow-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ski's relatives would advance the cost and fee for the appeal, which they never did. [32]

Q. Now, I might state, Mr. Curran, that Barnowski has testified in the case in Kansas to the effect that you secured the sum of one hundred dollars from his mother, for the purposes of perfecting an appeal. What are the facts in that regard?

A. That sum of money was paid me for the purpose of filing a motion for a new trial, and the receipt that was given to Barnowski—Barnowski's brother, I believe—will so show.

Q. Mr. Curran, had you been paid any other money for your services in defending these men in the trial?

A. Outside of the \$25 which I was paid for my trip to Milan, and the hundred dollars which was paid for the motion for a new trial, I received no compensation whatsoever for any work done—the trial, consultation, any work—from Barnowski or McDonald, or anyone in their behalf.

Q. Mr. Curran, did you have any conversation with Mr. Babcock of the United States Attorney's office, or contact him in regard to securing an early trial for McDonald and Barnowski, at any time prior to the trial?

A. As I stated before, when I came back from Milan, I first checked up with the trial judge and also the District Attorney's office, Mr. Babcock, through Mr. Babcock, and it was Mr. Babcock's

(Deposition of George F. Curran.)

information that he was in the trial of a case at that time, criminal trial, that was pending before the Barnowski and McDonald case was pending, and there was one other case, I believe, that he had to try before the McDonald and Barnowski case was to be tried, and immediately upon the conclusion of that case, he would try the McDonald and Barnowski case.

Q. You recall whether or not the case Mr. Babcock referred to was the Securities & Exchange case that lasted some eleven weeks?

A. It was. There were a number of defendants—there were, oh, upwards of six to twelve defendants in that case. I was not interested in the case, but I know that there were a number of defendants in the case.

Q. Now, Mr. Curran, in regard to the charges filed with the Michigan Bar Association against you by McDonald, will you state what the facts are in regard to that and what disposition was made of that matter?

A. Well, I filed a return—or, rather, possibly I should say a statement, showing my side of the case, and the charges were dismissed by the State Bar Association. [33]

Q. Do you recall whether they were dismissed before the trial of the Barnowski case, or after the trial?

A. That I don't remember; I wouldn't say.

Q. Now, on the morning of the trial, when the

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

trial convened before Judge Moinet, was any formal motion for continuance filed in writing?

A. There was no formal motion for continuance.

Q. Was there any formal motion filed by the petitioners for other counsel?

A. No, no motion—formal motion, written motion—was filed by anyone that morning.

Q. And you had not discussed the matter of the charges filed against you by McDonald with them prior to going into the courtroom that morning, or they had not discussed it with you, is that correct?

A. That is right.

Q. And it was your—

A. (Interposing) In regard to your question whether those charges were dismissed by the Bar Association after the trial, I am certain now that it was after; I would almost say definitely it was after the trial of this case that that happened.

Q. I see. Now, in your representing these men in the trial of this case, Mr. Curran, did you give them the benefit of your best services, in accordance with your oath as a member of the Bar of the State of Michigan?

A. I did. There were, of course, investigations that could have been accomplished had we had any money to do it, but there was no money to do anything, and I didn't advance any money for these men; but as far as services rendered, I did everything I possibly could to give them the benefit of a fair trial.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom?

A. It is a question of whether my viewpoint of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that.

Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law?

A. Rulings of the Court on law. [34]

Q. But outside of the fact that the rulings did not perhaps agree with your conception of the law, were they granted a fair trial as to procedure and given a full opportunity to present their defense?

A. They were.

Mr. Davis: Now, Mr. Curran, the petitioners have filed a set of interrogatories or questions that they desire to ask of you, and I will ask those at this time. Off the record——

(Discussion off the record.)

Cross Examination

Q. The first question they desire to ask, Mr. Curran, is: Were you ever retained by McDonald or Barnowski to defend either or both of them in case No. 24,742?

A. I was never paid a retainer fee, but I was promised fees by the defendants, Barnowski and McDonald, which I was never paid, to represent them.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. The next question is: If so, when?

A. I think my previous answer answers that question.

Q. By whom?

A. I still think that that is answered by the first answer.

Q. What was the agreement?

A. When I was first called by Mr. McDonald, we discussed not my representing them so much as effecting their release, because it was their contention at first that they were not guilty, and consequently they didn't anticipate a warrant being issued.

Q. What was your fee?

A. I have received no fee.

Q. When were you paid?

A. I was not paid at any time outside of the \$25 for the trip to Milan and the hundred dollars for the filing of the motion for a new trial.

Q. If you were not hired by either defendant, did the Court appoint you as counsel for either or both of said defendants in cause No. 24,742?

A. No, the Court did not appoint me.

Q. If so, by what Judge were you appointed? That is already answered, I take it.

A. Yes. [35]

Q. On what date? That is already answered.

A. Yes.

Q. Did you represent either or both defendants when arraigned on their warrant? A. I did.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. If so, whom did you represent?

A. Otto Barnowski and Walter McDonald.

Q. On what date?

A. That I can't give you. I would have to consult the court file showing the date of the arraignment, which I believe were both held before Judge Moinet. Walter McDonald was arraigned approximately a week prior to the date of the arraignment of Otto Barnowski.

Q. Were said defendants given a hearing or examination before Commissioner Stanley Hurd?

A. They were not, because they were scheduled to have an examination, but the day before the examination the District Attorney presented the facts to the United States Grand Jury and an indictment was returned, which obviated the necessity of an examination.

Q. Did you represent said defendants when arraigned on indictment 24,742?

A. At this time I can't tell you whether I was present in the court at that time or not.

Q. Was the indictment read?

A. That I don't remember.

Q. Were you requested to interview either of said defendants in the United States detention farm at Milan, Michigan?

A. I was.

Q. Did you interview them?

A. I did.

Q. On what date?

A. I can't give you the exact date at this time. I would think it was somewhere in the neighbor-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

hood of October or November of—what year was that?

Q. 1938. A. 1938.

Q. Is it true that Warden Ryan interviewed you immediately after your [36] arrival?

A. No. I interviewed Warden Ryan because of certain accusations that were made by the prisoners as to their treatment in the prison.

Q. Is it true that Warden Ryan instructed you to warn McDonald and Barnowski that they better not get convicted or it will be too bad for them?

A. There was some discussion by the Warden that they had not been very good prisoners, and that in the event that they were convicted they could not expect the best treatment, or some such statement to that effect.

Q. State exactly of what said defendants consulted you during said interview?

A. Both defendants consulted me during that interview.

Q. Did you make any agreement with said defendants at that time? If so, of what nature?

A. That has been—I would rather answer that question because of the argument over this writ of habeas corpus, so it will be clear. We discussed the question at that time of why they were being held so long at the detention farm, and their claim was that the Government didn't have any case against them and didn't want to take time to try it. I advised them that if such was the case, that

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

we could secure a speedy trial by having a writ of habeas corpus issued, and I stated that if that was the case, that I would do that. Then, as I have stated before in this examination, I consulted with the Judge and also with the District Attorney, Mr. Babcock, who informed me that just as soon as the cases that were pending prior to the defendants' cases—these defendants' cases, McDonald and Barnowski—had been disposed of, that the defendants, McDonald and Barnowski, would be tried on the indictment upon which they were then being held. I so advised them by letter, and that is the reason that no writ of habeas corpus was ever issued.

Q. The various records show that you visited said defendants at the United States detention farm at Milan, Michigan, on October 5, 1938. At any time succeeding this date, and until January 23, 1939, did you see [37] either of said defendants or have any verbal or written intercourse, except the letter written to McDonald dated October 14, 1938, with said defendants of any nature or by any means whatsoever?

A. I believe that I saw the defendants once after that, at the detention farm, and it is my recollection that I also wrote a letter to them. Between what date is that?

Q. October 5, 1938 and January 23, 1939.

A. And I also saw the defendants at the Wayne County Jail.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. On what date did defendant McDonald file a complaint against you before the Michigan bar?

A. That was sometime in December, I believe.

Q. Is it true that a letter you wrote to McDonald, dated October 14, 1938, repudiating an agreement made with him on October 5, 1938, was the basis upon which his complaint before the Michigan State Bar was founded?

A. I did not repudiate any agreement with Mr. McDonald made at any time.

Q. On what date did the Michigan State Bar hear this complaint?

A. There never was any hearing on it, as far as I know.

Q. Is it true that you acted as defense counsel in the United States District Court for said complainants against you before the Michigan State Bar, while their said complaint was pending against you before the Michigan State Bar?

A. I believe that is true.

Q. On what date did you officially file with the United States Clerk, Mr. George M. Read, an appearance as defense counsel in case No. 24,742?

A. January 10th.

Q. Had you consulted either defendant about such proposed action? If so, when? By what means?

A. I had never discussed with them, any more than I ever discussed with any other client, the filing of an appearance, the formal filing of an

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

appearance; but it was my understanding I was to represent them, and it was upon that understanding that I filed the appearance.

Q. Did you notify said defendants of your filing said appearance? If so, when? [38]

A. I don't believe I did.

Q. Is it true that you never had any contact with said defendants personally or in writing, except by letter of October 14th to McDonald, from October 5, 1938 until the proceeding and trial, January 23, 1939?

A. That has been answered before.

Q. When you encountered McDonald in the Wayne County Jail on the evening of January 23, 1939, was attorney George Fitzgerald conferring with him?

A. Well, Mr. Fitzgerald was either there, or had been there, and it was based upon the fact that some friend of Mr. McDonald's had sent him in there.

Q. Is it true that McDonald stated to you at that time that you could not competently defend him because of your pending trial before the Michigan State Bar on his complaint.

A. I don't remember of any such conversation.

Q. Is it true that you advised McDonald that he would have to enter his objections to the Court?

A. There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ask to be discharged from the case, but that if he wanted he could so advise the Court, which he did.

Q. Did the Court grant his request?

A. It did not.

Q. Is it true that McDonald rose a second time to protest and was ordered by the Judge to sit down? A. I don't recall that.

Q. Is it true that when the trial began of this said cause, on January 24, 1939, that you moved the Court for a postponement, so that you could prepare a proper structure of defense.

A. That is true.

Q. Was the motion granted? A. No.

Q. During your connection with this said cause, were you ever instructed by said defendants to consult any court official regarding their case? [39] If so, by what defendant? At what time? For what purpose? A. I don't recall.

Q. How many times did you consult Prosecutor Babcock to urge an early trial of said cause?

A. I believe I only saw him twice on this case.

Q. At any time during your connections with said case, did said defendants inform you that they had witnesses to be heard in their behalf?

A. They stated that there were witnesses that could be secured.

Q. Did you file a witness praecipe with the Court for witnesses to be subpoenaed in their behalf?

A. I secured subpoenas from the Court for wit-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

nesses, witnesses whom they claim could aid them in their defense.

Q. Were you present when the jury returned its verdict? A. I was.

Q. If so, did you poll the jury? A. No.

Q. If not, why not?

A. Because I didn't think it was necessary.

Q. Were you present when petitioners were sentenced? A. No.

Q. If so, did the Court permit either defendant to make a statement?

A. I am unable to say because I was not present.

Q. Was a statement made by either defendant?

A. I don't know.

Q. Which defendant? A. I don't know.

Q. Did you file a motion for a new trial?

A. I did.

Q. If so, on what date?

A. It was two days after the sentence, whatever date the sentence was.

Q. Was it denied? A. It was.

Q. On what date?

A. Well, the motion had been adjourned several weeks and finally was denied by the trial judge.

Q. Were you paid to file an appeal in this said cause? A. No.

Q. How much, and by whom?

A. I was paid no money by anyone to file an appeal in this cause.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Did defendant Barnowski's relatives pay you any money? A. They did.

Q. When, and for what purpose?

A. I believe it was around the 25th—they were not sentenced on the 25th?

Q. 26th of January.

A. About the 25th of January; I was paid a hundred dollars to file a motion for a new trial by Otto Barnowski's relatives.

Q. Was it denied? A. It was.

Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under date of May 3, 1939, with a request of two hundred dollars to further finance his appeal?

A. I believe I did.

Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939?

A. I don't remember the dates that this took place.

Q. Is it true that you never filed a notice of appeal in case No. 24,742?

A. I believe that is right.

Mr. Davis: Redirect examination.

Redirect Examination

By Mr. Davis:

Q. The reason you didn't file an appeal, Mr. Curran, as I understand your testimony, is the fact that you were not paid to do so?

A. That is right.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Mr. Curran, prior to the morning the case convened in January—I believe it was January 24, 1939—I believe you have stated that you had no information or instructions from either defendant to withdraw as their attorney, other than the statement that was made in the courtroom, as you have testified? [41]

A. That is right.

Mr. Davis: Do you want the reporter to submit this and sign it?

Mr. Curran: I will waive my signature.

JOHN W. BABCOCK

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please.

A. John W. Babcock.

Q. Where do you reside? A. In Detroit.

Q. What is your occupation?

A. Chief Assistant United States Attorney for the Eastern District of Michigan.

Q. And have been——

A. Since May, 1937.

Q. Did you have charge of the case of United

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

States vs. Walter McDonald and Otto Barnowski,
No. 24742? A. I did.

Q. Will you state in detail the various steps in connection with the prosecution of the above named defendants?

A. On March 30, 1938, a complaint was filed, having been signed by an agent of the Federal Bureau of Investigation before Honorable Edward J. Moinet, United States District Judge, in the absence of the United States Commissioner, and a warrant signed for Walter McDonald by Judge Moinet. Judge Moinet at that time set April 18th as the date hearing before the United States Commissioner. On April 5, 1938, a similar complaint was filed with Judge Moinet, Special Agent Earl L. Richmond of the Federal Bureau of Investigation signing the complaint. Judge Moinet signed a warrant and Barnowski was arrested and [42] arraigned on the warrant. And Judge Moinet also set April 18th as the date for hearing before the Commissioner.

Q. Pardon me; just one question: At the arraignment of both of these petitioners were they represented by counsel?

A. They were represented by Mr. George F. Curran.

Q. Proceed.

A. Subsequently, upon being interviewed by agents of the Federal Bureau of Investigation, and of course as to this I have no personal recollec-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

tion, but I am just giving the facts as appear from the reports of the Federal Bureau of Investigation in our file, the two defendants told the agents of certain evidence that might—if true, establish their innocence, and in order to permit the complete investigation, with the possibility of establishing their innocence, as claimed by them, the hearings before the Commissioner were continued on April 18th to April 25th, and from April 25th to May 3, 1938.

Between April 25th and May 3, 1938, we determined that the evidence purportedly given to the Federal Bureau of Investigation agents by these two defendants, and investigated by the agents completely, was not reliable and determined to present the matter to the Grand Jury. It was presented on May 3, 1938, and an indictment voted. The indictment was returned and filed with the United States District Court of Michigan on May 4, 1938, and the two defendants arraigned on the indictment on June 10, 1938. At the time of this arraignment both defendants were represented by Mr. George F. Curran, attorney at law. The case was then held pending until January 24, 1939, when the trial commenced.

Q. In connection with the delay, or the interval of time elapsing from the return of the indictment until the trial, will you state what the condition of the docket, the criminal docket, was in this district?

A. The custom and practice among the judges

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

of the Eastern District of Michigan is to make available to the office of the United States Attorney only one judge during any given month, and this was the practice and custom in 1938 and 1939. Also it is the custom and practice in this district to excuse the traverse jury during the entire month [43] of August. Consequently we had no jury here during August of 1938. The docket, by reason of our inability to obtain the services of a judge and jury to try our cases, was very crowded, with cases which were instituted for the most part prior to the date of institution of this case No. 24,742.

Q. What was the nature of some of the cases that were taking the time of your office at this time, Mr. Babcock?

A. Well, without checking our statistical records I can't give you the facts for the complete period of time, but by way of example I have a distinct memory of a case of the United States against Norman Barry and others, a case involving mail fraud, conspiracy and violation of the Securities and Exchange Act, in which case, as I recall it now, the indictment was first returned in 1935 or early in 1936, and that was one of the cases which was disposed of or rather, of which disposition was made between the spring of 1938, and the end of that year. In fact, the trial of that case began early in October—I think October 3, 1938, and the trial of that case continued until December 19, 1938.

Q. Mr. Babcock, was the case of Barnowski and

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

McDonald handled as quickly as it could be handled in this district, considering the volume of business and the interests of the public at large?

A. Very definitely it was. The investigation was completed about the time of the return of the indictment and the case was ready for trial and was tried at the earliest possible moment consistent with the developments of the calendar, in the usual course of events.

Q. Mr. Babcock, when this case came on for trial,—I believe on January 24, 1939—will you state whether or not the petitioners, McDonald and Barnowski, appeared in court that morning with an attorney?

A. They did; they were represented by Mr. George F. Curran.

Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready [44] to proceed. I don't recall what response Mr. Curran made, but I recall that Mr. McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said.

Q. Was a formal motion filed by either McDon-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

ald or Barnowski for the appointment of other counsel? A. No, sir.

Q. Was a formal motion made by either McDonald or Barnowski or Curran, their attorney, for a continuance of the case?

A. No formal motion in writing. Now that you mention the matter of continuance, I do recall that Mr. Curran stated that either that very morning or the evening before the defendants had named to him several people whom they desired to have subpoenaed as witnesses, and he did request a continuance for the purpose of subpoenaing these parties as witnesses.

Q. Were those witnesses later produced in Court?

A. I do not know. The names of the parties were not given to the Court or to anyone else.

Q. Now, was the trial proceeded with then?

A. Yes, sir. Incidentally, I am very certain that no exception was taken to the Court's denial of the informal motion for continuance.

Q. Did the Government put on its evidence then? A. Yes, sir.

Q. And then did the defendants put on their evidence? A. Yes.

Q. Have witnesses appear in their behalf?

A. Oh, yes.

Q. The case was argued by both sides?

A. Yes, sir.

Q. The jury instructed? A. Yes, sir.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Retired, and returned a verdict of guilty?

A. Yes, sir. [45]

Q. Mr. Babcock, did you at any time have any conferences with Mr. George Curran, attorney for Barnowski and McDonald, prior to the date of the trial, in regard to their securing an early trial in the case?

A. I remember very distinctly that I had one, and it may be possible that he might have telephoned me a few times on other occasions, but on only one occasion did he come over to the office to see me.

Q. And in that conversation did you explain the condition of the docket, as you have already testified here, to Mr. Curran?

A. I did. Mr. Curran advised me that he had been requested by Barnowski and McDonald to petition for a writ of habeas corpus to protest their detention at Milan because of the delay of the trial. I told him we, of course, would do nothing to prevent his suing out the writ of habeas corpus, but that the condition of the docket, the criminal docket, was such that the case just could not be brought on for trial, at least not at that particular moment, because at the time of our conversation the prosecution of the Norman Barry case was in progress.

Q. Now, Mr. Babcock, in connection with the morning the trial convened, did Mr. McDonald or did anybody in the courtroom state what the details

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

of the alleged differences were between McDonald and Mr. Curran to the Court?

A. No, sir.

Q. Was anything said by Mr. McDonald or Mr. Curran, or Mr. Barnowski, to the effect that they had filed charges before the Michigan Bar against Mr. Curran? A. I don't recall that.

Mr. Davis: Mr. Babcock, the petitioners have filed written interrogatories to be asked of you at this time. I will ask them now.

Cross Examination

Q. Is it true that Earl Richmond had charge of the investigation in case 24,742?

A. I don't know. Mr. Richmond, one agent D. L. McCormack, and Special Agent L. K. Cook of the Federal Bureau of Investigation all participated in the investigation. [46]

Q. When was said investigation concluded?

A. I think I should answer that by saying when the trial was over, in view of the fact that all our investigations continue constantly until the conclusion of the trial.

Q. When was Richmond transferred out of the Eastern District of Michigan?

A. I do not know.

Q. Is it true that the reason said cause was not tried according to its docket number was because all witnesses refused to identify said defendants at that time? A. That is not so.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Why did you refuse to permit Richmond to give said defendants the lie detector test?

A. I did not refuse.

Q. Why were 125 cases advanced to be heard at the expense of the priority enjoyed by case No. 24,742?

A. I do not know that 125 cases were advanced, or that any cases were advanced.

Q. Why did you have said case continued before the United States Commissioner until an indictment was returned?

A. Because the defendants, as I was advised, had requested the Federal Bureau of Investigation agents to make certain investigations which the defendants thought would establish their innocence, and both the Federal Bureau of Investigation and our office were as anxious to establish their innocence, if that was a fact, as we were to establish their guilt, if that was a fact.

Q. Did you ever talk with attorney Morris Weller about this said cause?

A. I do not recall ever having a conversation with Morris Weller or knowing the gentleman at all.

Q. If so, state in detail the substance of said conversation. That is answered, I take it, by your former answer. Did you ever have any conversation with attorney George Fitzgerald about said defendants?

A. I do not recall having a conversation with Mr. Fitzgerald about this case.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. State the substance of said conversation. I take it that is answered [47] by the former question? A. That's right.

Q. Did Attorney Curran, in November, 1938, complain to you about attorney George Fitzgerald taking active interest in securing a writ of habeas corpus for said defendants?

A. I do not recall that he did.

Q. State the facts concerning this conflict of interest and what part you had in it.

A. I do not recall any conflict of interest and know that I had no part in any such conflict, if any such conflict existed.

Q. Did you talk the matter over with attorney George Fitzgerald in your office?

A. I do not recall ever doing so?

Q. Did you settle this misunderstanding?

A. I certainly did not settle any misunderstanding.

Q. Did you advise Attorney Fitzgerald not to interfere in this said cause, as defendants did not have any money anyway? A. I did not.

Q. Did you receive a letter from defendant Barnowski, while he was confined in the United States detention farm at Milan, Michigan?

A. The file of our office indicates that a letter was written to me by a Barnowski on November 17, 1938.

Q. If so, why was this request ignored?

A. As I recall it, it was about this same time

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

that Mr. Curran called on me to take up the question of bringing the case on for trial, and the letter was not ignored because I felt it was answered by my conversation with his attorney.

Q. Why did you personally prevent him from obtaining his own physician to testify as to his physical deformity? A. I did not.

Q. Isn't it a fact that you personally made a secret agreement with Attorney George Curran whereby he was to be present at said defendants' trial to conform to legal requirements, but to make a feeble attempt only to defend said defendants, so as to insure a conviction, regardless of what methods he "choose" to employ? A. It is not.

Redirect Examination

By Mr. Davis:

Q. Mr. Babcock, do you have an opinion as to whether Barnowski and McDonald had a fair trial in their case in your district?

A. I am convinced they did.

Mr. Davis: I think that is about everything. Do you want to waive your signature?

Mr. Babcock: I will waive it.

Exhibit "C"—(Continued)

State of Michigan

County of Wayne—ss.

CERTIFICATE OF NOTARY PUBLIC

I, Eugene Karst, a Notary Public in and for said County and State aforesaid, duly commissioned and qualified, do hereby certify that the witnesses George F. Curran and John W. Babcock, whose depositions were taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Wayne County, Michigan, were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said depositions then given by said witnesses was by me reduced to writing, and the said depositions are true and correct transcripts of the whole of the testimony so given by the said witnesses as aforesaid.

I further certify that the signature to said testimony were waived by counsel for the Respondent and by said witnesses.

The document referred to in the testimony of George F. Curran was delivered to me and marked Government's Exhibit 1, and is attached hereto.

I do further certify that the said depositions hereto attached were taken at the time and place mentioned and described in the caption and notice con-

Exhibit "C"—(Continued)

tained in said depositions and in the notice of said depositions which is hereto attached; and that said depositions were taken for the [49] reason that the said witnesses live at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the depositions aforesaid to the said Court with my own hand, I have sealed up the same and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said depositions have been retained in my possession since the taking thereof, and until the same were sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hindspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said depositions by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division; and that petitioners Walter McDonald and Otto Barnowski were not represented by counsel nor present at the time of the taking of said depositions.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

In Witness Whereof, I have hereunto set my

Exhibit "C"—(Continued)

hand and seal at Detroit, County of Wayne and State of Michigan, this 7th day of July, A.D. 1941.

EUGENE KARST

Notary Public, Wayne County, Michigan. My commission expires Jan. 17, 1944.

[Endorsed]: Filed June 13, 1945. C. W. Calbreath, Clerk. [50]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered That James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 23rd day of July, 1945, at the hour of 10 o'clock A.M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: June 15th, 1945.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Jun. 15, 1945. [51]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of the United States of America vs. Walter McDonald, et al, Criminal No. 24742, made and entered on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, reported in 139 F.(2d) 939, and transfer order dated May 15, 1943, issued at Washington, D. C., by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States;

II.

That heretofore petitioner filed a petition for writ

of habeas corpus before this Honorable Court in case number 23414-S, which petition was denied;

III.

That the entire record of the proceedings in habeas corpus case number 23414-S is referred to and incorporated herein as though set forth in full. [52]

Wherefore respondent prays that the petition for writ of habeas corpus be denied.

Dated: July 23, 1945.

(Signed) FRANK J. HENNESSY
United States Attorney.

[Endorsed]: Filed July 23, 1945. [53]

[Title of Court and Cause.]

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

The above named petitioner, Walter McDonald, in answer to the return of James A. Johnston, Warden, to the order to show cause, respectfully shows:

I.

That respondent, by failing to deny any of the averments in the petition for writ of habeas corpus, tacitly concedes the verity of said allegations in said petition.

II.

That the question of fact being involved, and not disputed by respondent, it remains only for the

court to hear the cause upon the merits, reach its determination upon the oral testimony and the depositions, and enter judgment. (Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574.)

III.

Respondent prays for a denial of the petition for the writ of habeas corpus for the reason that petitioner had a prior petitioner denied. This prior petition has no relevancy whatsoever to the present application and, therefore, merits no discussion.

Wherefore, petitioner having been denied his personal request for the assistance of counsel during his trial on indictment No. 24742, the trial court lost jurisdiction to proceed to trial and conviction of petitioner. And by reason thereof petitioner is now illegally deprived of his liberty. Petitioner prays this court for a hearing on the merits, that pertinent testimony be adduced, that the issue of fact involved be judicially determined, and that judgment be entered accordingly.

Respectfully submitted,

WALTER McDONALD

Petitioner Pro se

Dated August 1, 1945.

[Endorsed]: Filed Aug. 1, 1945. [54]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of August, in the year of our Lord one thousand nine and forty-five.

Present: the Honorable A. F. St. Sure
District Judge.

[Title of Cause.]

ORDER APPOINTING WAYNE COLLINS,
ESQ., AS COUNSEL FOR PETITIONER

This case came on regularly this day for hearing on the order to show cause. The petitioner herein having requested the Court to appoint counsel to represent him in this matter, the Court this day appointed Wayne Collins, Esq., as counsel for the petitioner, and Ordered that this matter be continued to August 23, 1945. [55]

[Title of Court and Cause.]

MEMORANDUM AND ORDER DENYING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND REMANDING THE CASE AGAINST PETITIONER TO THE DISTRICT COURT OF MICHIGAN FOR FURTHER PROCEEDINGS.

Petitioner seeks release from the United States Penitentiary at Alcatraz upon the ground that he was denied his constitutional right of assistance of counsel at the time of his trial upon the charge for which he is imprisoned.

Petitioner with another defendant was indicted in the District Court of the United States for the Eastern District of Michigan, Southern Division, charged with violation of Title 12 USCA ss588b(a) and 588b(b). Each was found guilty and was sentenced on January 26, 1939 to a term of imprisonment of 35 years.

Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed.

Petitioner contends that his case is governed by *Glasser v. United States*, 315 U.S. 60. [56]

Respondent in moving to dismiss contends that petitioner knew of this point, which he now raises for the first time, when he filed his petition, No. 23414-S which was denied by this Court on August 29, 1944 (affirmed 149 F. (2d) 768), and that he is therefore barred from asserting the point under *Swihart v. Johnston*, decided by the Ninth Circuit Court of Appeals on August 6, 1945. Respondent also urges that the very point petitioner now raises, namely that he was denied assistance of counsel, was decided adversely to him in 113 F. (2d) 984 and 129 F. (2d) 196, and that this Court should follow the ruling of the Tenth Circuit Court.

In the *Glasser* case, *supra*, *Glasser*, a former Assistant United States Attorney was found guilty of conspiracy to defraud the United States and appealed. At the time of trial *Glasser's* counsel was appointed by the court to represent one of the co-defendants. *Glasser* objected to the appointment of his attorney to represent a co-defendant, but the appointment was made and the trial had. The Supreme Court said, page 70: “* * we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U.S. 45, so are we clear that the ‘assistance of counsel’ guaranteed by the Sixth Amend-

ment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. * * * We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional [57] experience may be a factor in determining whether he actually waived his right to the assistance of counsel. *Johnston v. Zerbst*, 304 U.S. 458, 464. But it is by no means conclusive. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. * * * The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." The conviction of Glasser was set aside and he was remanded to the court for a new trial.

The language of the *Swihart* case, *supra*, relied

on by respondent, is to the effect that if facts are known to the petitioner and they are not alleged in his first petition he should not be allowed to file another petition based upon the same matters, for "to reserve them for use in a later proceeding 'was to make an abusive use of the writ of habeas corpus' ". The court further said: "Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is prior refusal to discharge on a like petition." The rule stated may be invoked where there is a repetitious filing, but if the point raised by the petitioner is one which affects his substantial legal rights, although known and not urged in a prior petition, the trial court should take judicial cognizance of it.

As we have seen, the point of assistance of counsel has not been heretofore raised in this court by petitioner. And respondent points out that in *McDonald v. Hudspeth*, 113 F.(2d) 984 and in *McDonald v. Hudspeth*, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance [58] of counsel. The first case was decided before the Supreme Court's decision in the *Glasser* case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the *Glasser* case or its decision would have been otherwise.

Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) Glasser is disclosed by the record before us."

Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the "requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus." *Johnston v. Zerbst*, 304 U.S. 458, 468.

In conformity with the rule mentioned in *In re Bonner*, Pet., 151 U.S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court.

It is therefore Ordered:

1. That Walter McDonald, petitioner herein, be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment. [59]

2. The motion to dismiss is Denied.

Dated: September 20, 1945.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Sept. 20, 1945. [60]

[Title of Court and Cause.]

NOTICE TO APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice is hereby given that James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, the respondent in the above entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Memorandum and Order Denying Motion to Dismiss Petition for Writ of Habeas Corpus and Remanding the case against Petitioner to the District Court for the Eastern District of Michigan for further Proceedings, made and entered in the above entitled action on September 20, 1945.

Dated: September 21, 1945.

(Signed) FRANK J. HENNESSY
United States Attorney,

(Signed) JOSEPH KARESH
Assistant United States
Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Sept. 21, 1945. [61]

[Title of Court and Cause.]

NOTICE

To: Wayne M. Collins, Esq., Attorney at Law,
Mills Tower, San Francisco, California.

You Are Hereby Notified that on Sept. 21, 1945
a Notice of Appeal was filed by Frank J. Hennessy,
Esq., United States Attorney in the above entitled
case. A copy of which is enclosed herewith.

C. W. CALBREATH
Clerk, U. S. District Court

San Francisco, California, September 26, 1945.

[Title of Court and Cause.]

NOTICE OF MOTION

To Respondent Above-Named and to Frank J. Hennessy, U. S. Attorney, and Joseph A. Karesh, Deputy U. S. Attorney, Attorneys for the Respondent:

Please take notice that the petitioner, by his undersigned attorney, will bring the within motion on for hearing before this Court in the Department of Hon. A. F. St. Sure, U. S. District Judge, Post Office Building, 7th and Mission Streets, San Francisco, California, on Monday, October 8, 1945, at 10 o'clock A.M. of said day or as soon thereafter as counsel can be heard.

Dated: September 29, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

[Title of Court and Cause.]

MOTION TO AMEND FINDINGS AND JUDGMENT

William McDonald, the petitioner in the above-entitled proceeding, moves the Court to amend its findings and the order and judgment made and entered herein on September 20, 1945, captioned "Memorandum and Order Denying Motion to Dismiss Petition for Writ of Habeas Corpus and Remanding the Case Against Petitioner to the District

Court of Michigan for Further Proceedings" in the following particulars, to-wit:

By revoking, vacating, setting aside and striking therefrom the order remanding the petitioner to the custody of the U. S. Marshal for the Northern District of California and the order returning him to the U. S. District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the indictment therein referred to, which said matter appears on page 4 thereof and numbered and reading as follows, viz.,

"1. That Walter McDonald, petitioner herein be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on the said indictment."

and

To find, order, and adjudge as follows, to-wit that the petitioner is unlawfully held in custody and restrained of his liberty by respondent; that he is entitled to discharge from said custody and release from said restraint; that his application and petition to be restored to his liberty be granted and that forthwith he be ordered released from the custody and unlawful restraint of the respondent, his jailor, and also from the custody and jurisdiction of this court and the United States Marshal for the Northern District of California in whom such custody and jurisdiction technically may be lodged.

This motion will be based upon all the pleadings, records and files herein, including the petition for writ of habeas corpus, the order to show cause issued thereon, the return thereto entitled motion to dismiss, the traverse to the motion to dismiss, and the minute order of the Court entered on September 20, 1945, and the written order, judgment and opinion, above-mentioned, entered herein on said date by said Court, this motion and notice thereof and points and authorities in support thereof.

Dated: September 29, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

(Here follows Points and Authorities in Support of Motion.)

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Sept. 29, 1945. [65]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 (a)

James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, the respondent herein, hereby designates the complete record and proceedings in the above entitled cause for inclusion in the record on appeal, the same to include therein the following:

In Case No. 24885-S:

(1) Petition for writ of habeas corpus.

- (2) Order to show cause.
- (3) Return to order to show cause.
- (4) Traverse to return to order to show cause.
- (5) Order appointing Wayne Collins, Esq., as attorney for petitioner. [66]
- (6) Opinion and order of United States District Judge A. F. St. Sure of September 20, 1945.
- (7) Notice of appeal.
- (8) Clerk's notice of appeal.
- (9) This designation of contents of record.
- (10) Clerk's certificate.

In Case No. 23414-S:

- (1) Petition for writ of habeas corpus.
- (2) Order to show cause.
- (3) Return to order to show cause and all respondent's exhibits.
- (4) Traverse to return to order to show cause.
- (5) Order of United States District Judge A. F. St. Sure of August 16, 1944, denying petition for writ of habeas corpus.
- (6) Amended order of United States District Judge A. F. St. Sure of September 5, 1944, denying petition for writ of habeas corpus.
- (7) Notice of appeal.
- (8) Mandate of Circuit Court of Appeals for

the Ninth Circuit affirming judgment of the District Court.

(Signed) FRANK J. HENNESSY

United States Attorney,

(Signed) JOSEPH KARESH

Assistant United States At.
torney,

Attorneys for Respondent James A. Johnston,
Warden, United States Penitentiary, Alcatraz,
California.

[Endorsed]: Filed Oct. 5, 1945. [67]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of October, in the year of our Lord one thousand nine hundred and forty-five.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

DENYING MOTION TO AMEND FINDINGS
AND JUDGMENT

Petitioner's motion to amend findings being submitted to the Court for consideration and decision, and the same now being fully considered, it is Ordered that since this case has been appealed,

this Court has no jurisdiction in the matter, and the motion is therefore denied. [68]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein may have to and including December 10, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 31, 1945.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Oct. 31, 1945. [69]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Appellant herein may have to and including December 20, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: December 10, 1945.

A. F. ST. SURE

United States District Judge.

Endorsed]: Filed Dec. 10, 1945. [69-A]

[Title of Court and Cause.]

NOTICE OF APPEAL—(Cross-Appeal)

Notice is hereby given that Walter McDonald, petitioner above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the following part of that certain final judgment accompanied by written opinion entitled "Memorandum And Order Denying Motion To Dismiss Petition For Writ Of Habeas Corpus And Remanding The Case Against Petitioner To The District Court of Michigan For Further Proceedings" made and entered in this proceeding by the above-entitled Court on September 20, 1945, to-wit, that part thereof providing that petitioner be "remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of Michigan, Southern Division, for further proceedings on said indictment" and from that certain final order of the above-entitled Court, minute entry, denying [70] petitioner's "Motion To Amend Findings And Judgment" which was made and entered herein on October 23, 1945.

Dated: October 24, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner.

[Endorsed]: Filed Nov. 9, 1945. [71]

[Title of Court and Cause.]

PETITIONER'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL AND
PRAECIPE

Walter McDonald, petitioner herein, hereby designates that the complete record and all the proceedings in the cause be included in his record on appeal (cross-appeal) herein and that the same be included or incorporated in respondent's record on appeal herein and that it contain, in addition to the matter designated by respondent in his designation, the following, viz:

(1) Petitioner's Notice of and Motion To Amend Findings And Judgment filed herein on September 29, 1945.

(2) Order of Court (minute entry) made and entered on October 23, 1945, denying petitioner's Motion To Amend Findings And Judgment on ground that district court had no jurisdiction to amend [72] for the reason the respondent had filed his notice of appeal from the judgment which stayed proceedings in the district court;

(3) Petitioner's Notice of Appeal (Cross-Appeal) dated October 24, 1945; and

(4) This Designation of Contents of Record On Appeal and Praecipec, together with the below Stipulation.

Dated: October 24, 1945.

(Signed) WAYNE M. COLLINS

Attorney for Petitioner,
Cross Appellant.

STIPULATION

It is stipulated that the matters above-mentioned may be included in and consolidated with respondent's record on appeal and that such record be treated as a consolidated and as a several record on appeal of appellant and cross-appellant under Rules 74 and 75 (k) R.C.P.

Dated: October 24, 1945.

FRANK J. HENNESSY

U. S. Attorney

JOSEPH KARESH

Asst. U. S. Attorney

Counsel for Respondent and
Appellant.

WAYNE M. COLLINS

Counsel for Petitioner and
Cross-Appellant.

[Endorsed]: Filed Nov. 9, 1945. [73]

In the United States District Court for the Northern District of California, Southern Division

C. A. No. 23414-S

In the Matter of:

WALTER McDONALD,

Petitioner

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Walter McDonald respectfully shows:

That he is illegally restrained of his lawful liberty by color of authority of the United States and in the immediate custody of James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, which penitentiary is within the legal jurisdiction of this court.

STATEMENT OF FACT

Petitioner, on May 4, 1938 in the United States District Court for the Eastern District of Michigan, was indicted on six counts for violation of title 12, Section 588B, subsection (a), first count and title 12, Section 588B, subsection (b), second, third, fourth, fifth and sixth counts, the bank robbery statute. His trial began on January 24, 1939. A

verdict of guilty was returned on January 25, and January 26, 1939, he was sentenced to 35 years imprisonment. In support of which is an authentic copy of his judgment number 24742 attached hereto, made a part hereof and marked petitioner's Exhibit A.

On October 21, 1943, without trial or other due process, petitioners first said sentence was vacated and set aside and a second sentence of 25 years additional was imposed. In support of which is an authentic copy of said second judgment number 24742 attached hereto, made a part hereof and [75] marked petitioner's exhibit B.

STATEMENT OF THE CASE

On January 26, 1939, a cumulative sentence of 35 years was imposed on six counts of an indictment each count receiving an implied sentence of five years and ten months; all sentences to be served consecutively. This was a valid sentence. However, it was duplicitous as it imposed six sentences on six counts (only one of which was valid) for one offense.

In May 1943, petitioner had completed one sixth of the cumulative sentence imposed, in conformity with section 710, Title 18 U.S.C.A., the good time statute, which was the legal sentence on the one valid count.

On June 14, 1943, the United States Attorney for the United States District Court, Eastern Dis-

trict of Michigan, petitioned said District Court to vacate and set aside said first sentence as five of said six counts of said indictment numbered 24742 was repugnant to the Fifth Amendment.

On October 21, 1943, said petititon was granted and petitioner was given a second sentence of 25 years additional on the one good count.

CONTENTION OF PETITIONER

That petitioner is now restrained of his lawful liberty by color of authority of a court judgment without valid force or effect in law in that it puts petitioner a second time in jeopardy for the same offense in express violation of the Fifth Amendment of the United States Constitution.

WAIVER

It appearing from the substance and form of this petition for writ of habeas corpus that final adjudication of this legal action may be made and judgment entered solely on the recorded facts on the face of this record petitioner does, [76] here and now and by this method, waive his legal right, if any he may have, to be present in court at the hearing and disposition of this habeas corpus action.

PRAAYER

Wherefore, petitioner prays this Honorable court for a writ of habeas corpus ad subjiciendum to the respondent herein, Warden James A. Johnston,

commanding him to release petitioner forthwith from further unlawful custody. And petitioner will ever pray.

/s/ WALTER McDONALD

Petitioner Pro. Se.

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald, who, after being first duly sworn, upon his oath deposes and says; that he is the petitioner in the above entitled cause; that he has read the contents thereof; and that they are true to the best of his knowledge and belief.

/s/ WALTER McDONALD

Affiant and Petitioner.

Subscribed and Sworn to before me a Notary Public this 26 day of May, 1944.

[Seal] /s/ E. J. MILLER

Associate Warden, United States Penitentiary,
Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Walter McDonald is a citizen of the United States. [77]

EXHIBIT "A"

At a session of the United States District Court for the Eastern District of Mich., continued and held pursuant to adjournment at the Dist., Court room in the city of Detroit in said District on Thursday the twenty-sixth day of Jan., A. D. 1939.

Present: The Honorable E. J. Moinet, United States Judge.

UNITED STATES OF AMERICA

vs.

WALTER McDONALD and
OTTO BARNOWSKI

Indictment for vio: Title 12, Sec. 588 B (a) (b),
U.S.C. Banking Act of 1935, as amended. No.
24742. Filed 10 A. M., Jan. 26, 1939.

The defendant, Walter McDonald, alias, being present in court, and being represented by counsel, and having been found guilty by jury, of the charges in said indictment contained, and now being before the Bar of the court for sentence, and inquired of by the court if he had anything to say why sentence should not be imposed, and the court having fully considered all that said defendant had to say in his behalf, thereupon the court does now sentence said defendant Walter McDonald to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five years,

beginning on the date he is received at the penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention.

/s/ EDWARD J. MOINET
U. S. District Judge.

Approved as to form:

By: /s/ JOHN W. BABCOCK
Asst. U. S. Attorney. [78]

EXHIBIT "B"

In the District Court of the United States for the
Eastern District of Michigan, Southern Division

UNITED STATES OF AMERICA

vs.

WALTER McDONALD

Filed Oct 21, 1943.

No. 24742, Criminal Indictment in six counts for violation of U.S.C. Title 12, Section 588B (a), (b), Banking Act of 1935, as amended.

At a session of said court held in the Federal Building in the City of Detroit, this 21 day of October, A. D. 1943.

Present: Honorable Edward J. Moinet, U. S. District Judge.

In the matter above entitled, the defendant, after due and proper trial, was found guilty of the charges in the indictment by verdict of jury returned January 25, 1939, and the judgment of this court was entered January 26, 1939, committing said defendant to custody of the Attorney General for imprisonment for the term of thirty five years. It now appearing to the court that said judgment and sentence was void and, by order entered upon motion of the United States Attorney, has been vacated and set aside, the said defendant, Walter McDonald is now present in court for the purpose of re-sentence.

The said defendant, Walter McDonald, now being before the Bar of the Court for sentence, and having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative, consequent upon the verdict of guilty of the charges alleged in count two of the indictment filed herein, for the period [79] twenty five (25) years from and including this day, for imprisonment in a penitentiary.

It is Further Ordered that the Clerk deliver a

certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ EDWARD J. MOINET
U. S. Dist. Judge.

Approved as to form:

/s/ JOHN W. BABCOCK,
Asst. U. S. Atty.

[Endorsed]: Filed June 22, 1944. C. W. Calbreath, Clerk. [80]

[Title of Court and Cause—No. 23414-S.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alcatraz Island, State of California, appear before this Court on the 26th day of June, 1944, at the hour of 10 o'clock A. M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: June 14, 1944.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed June 14, 1944. [81]

[Title of Court and Cause—No. 23414-S.]

RETURN TO ORDER TO SHOW CAUSE

Comes now James A. Johnston, Warden of the United States Penitentiary, through Frank J. Hennesy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issued herein shows as follows:

I.

That the person hereinafter called the "petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, made and entered on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, and transfer order dated May 15, 1943, issued at Washington, D. C., by direction of the

Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States;

II.

That filed herewith and as a part of the Return and incorporated herein as though set forth in full are the following, constituting Respondent's Exhibit "A":

1. A certified copy of the original indictment, plea, verdict, sentences, and

2. Docket entries in said Criminal Cause No. 24742;

3. Transfer order issued as aforesaid on May 15, 1943;

4. A copy of the Record of Court Commitment of the [82] Department of Justice, Penal and Correctional Institutions United States Penitentiary at Alcatraz, California, in the case of Walter McDonald, No. 602 AZ;

III.

That also referred to and incorporated herein as though set forth in full is the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case of McDonald vs. Moinet, CCA-6 No. 9538, reported in 139 F. (2d) 939.

Wherefore respondent prays that the petition for habeas corpus be denied and the order to show cause discharged.

Dated: July 4, 1944.

FRANK J. HENNESSY

United States Attorney for the Northern District
of California

[Endorsed]: Filed July 5, 1944. [83]

RESPONDENT'S EXHIBIT "A"

Vio: Title 12, Sec. 588 (B) a, (b), USC, Banking
Act of 1935, as amended.

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division

Of the March Term, A. D., 1938

CR-24742

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of
America empaneled and sworn to inquire in and for
the body of the Southern Division of the Eastern
District of Michigan, upon their oaths present:
That heretofore, on or about the 25th day of March,
A. D. 1938, in the Southern Division of the Eastern
District of Michigan, and within the jurisdiction of
this Honorable Court, Walter McDonald, alias Wal-
ter Lewis, alias Walter McDougal, alias William
McDonnell, alias Walter Parkins, alias Walter Per-
kins, and Otto Barnowski, alias Otto Burns, alias

Respondent's Exhibit "A"—(Continued)

Otto Baranowski, late of the City of Detroit, Michigan, hereinafter referred to as defendants, did, by force and violence, and by putting in fear, unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper, officers and employees of the Farmington State Bank, a banking corporation organized and doing business under the laws of the State of Michigan, and a member bank of the Federal Reserve System, and an insured bank in the Federal Deposit Insurance Corporation, [84] certain monies, to-wit: the sum of five thousand eighty and 50/100 (\$5,080.50) Dollars, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time it was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation, and a member bank in the Federal Reserve System; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter

Respondent's Exhibit "A"—(Continued)

McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly, and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: [85] assault, and put in jeopardy the life of Howard C. Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranow-

Respondent's Exhibit "A"—(Continued)

ski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of G. Irene Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, [86] alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the

Respondent's Exhibit "A"—(Continued)

Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Arvale Tipper, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense

Respondent's Exhibit "A"—(Continued)
hereinbefore described in the first count [87] hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Kniekerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Mary Elizabeth Berry, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SIXTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously, rob,

Respondent's Exhibit "A"—(Continued)

steal and take from the possession of Howard G. Knickerbocker, G. Irene Knickerbocker and Alvale Tipper money in the care, custody, and control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Robert J. Stewart, by [88] the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN C. LEHR

United States Attorney,

JOHN W. BABCOCK

Assistant United States Attorney, Eastern District
of Michigan. [89]

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District on Friday, the tenth day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Respondent's Exhibit "A"—(Continued)

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, being present in Court and being arraigned on the indictment heretofore filed against him, waives the reading thereof and pleads not guilty to the charges in said indictment contained.

Thereupon the Court does now fix the bail of said defendant at the sum of \$50,000.00.

EDWARD J. MOINET,
U. S. District Judge. [90]

United States of America, in the District Court of
the United States, for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Wednesday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

In this cause, the jurors heretofore empaneled

Respondent's Exhibit "A"—(Continued)

and sworn, come into Court again and sit together, and after hearing the conclusion of the evidence in the case, the arguments of counsel, and the charge of the Court, retire under the charge of the officer duly sworn for that purpose to consider of their verdict to be rendered; and after being absent for a time come into Court again and say upon their oaths that defendants, Walter McDonald, alias, and Otto Barnowski, alias, are guilty as charged.

Thereupon said jurors are excused from further consideration of this case, and the Court do now here order the sentence of said defendants deferred to tomorrow, January 26, 1939, and said defendants remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
U. S. District Judge. [91]

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit in said District on Thursday, the twenty-sixth day of January, A.D. 1939.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias, being present in Court, and being represented by coun-

Respondent's Exhibit "A"—(Continued)

sel, and having been found guilty by Jury, of the charges in said indictment contained, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence the said defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five (35) years, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of [92] detention.

(Signed) EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 26, 1939. [93]

Respondent's Exhibit "A"—(Continued)

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

[Title of Cause.]

At a session of said Court held in the Federal
Building in the City of Detroit, this 21st day of
October, A.D. 1943.

Present: Honorable Edward J. Moinet,
United States District Judge.

In the matter above entitled, the defendant, after
due and proper trial was found guilty of the charges
in the indictment by verdict of jury returned Jan-
uary 25, 1939, and the judgment of this Court was
entered January 26, 1939, committing said defend-
ant to the custody of the Attorney General for im-
prisonment for the term of thirty-five years. It now
appearing to the Court that said judgment and sen-
tence was void and by Order entered upon motion
of the United States Attorney has been vacated
and set aside, the said defendant, Walter McDon-
ald, is now present in Court for the purpose of re-
sentence.

The said defendant, Walter McDonald, now be-
ing before the Bar of the Court for sentence, and
having been now asked whether he has anything to
say why judgment should not be pronounced against
him, and no sufficient cause to the contrary being
shown or appearing to the Court, It Is By the Court

Respondent's Exhibit "A"—(Continued)

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative, consequent upon the verdict of guilty of the charges alleged in Count Two of the indictment filed herein, for the [94] period of twenty-five (25) years from and including this day, for imprisonment in a penitentiary.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) EDWARD J. MOINET,
United States District Judge.

Approved as to form:

(Signed) JOHN W. BABCOCK,
Assistant U. S. Attorney. [95]

CRIMINAL DOCKET

Docket 24742

[Title of Cause.]

1938. Proceedings.

May 4 Indictment filed. Report of vote of Grand Jurors filed.

Respondent's Exhibit "A"—(Continued)

1938

June 10 Defendant Walter McDonald arraigned, Indictment read, pleads Not Guilty. Bond fixed \$50,000.00. Remanded to custody Moinet J. Defendant Otto Barnowski arraigned. Indictment read. Pleads Not Guilty. Bond fixed at \$50,000.00. Remanded to custody Moinet J.

1939.

Jan. 11 Appearance of Defendant Walter McDonald by George F. Curran, Attorney, filed. Appearance of defendant Otto Barnowski by George F. Curran, Attorney, filed.

Jan. 20 Subpoena to Mary Elizabeth Beery rtd seved January 18, 1939 filed.

Jan. 24 Jury trial begins. Jurors impaneled and sworn. Witnesses sworn. Continued to Jan. 25, 1939. Moinet J.

Jan. 25 Jury trial resumed. Arguments of Counsel. Charge of the Court. Verdict: Guilty as charged—both defendants. Sentence deferred to January 26, 1939. Defendants remanded. Moinet J.

Jan. 26 Defendant Walter McDonald sentenced to imprisonment for 35 years. Moinet J. Commitment issued. Defendant Otto Barnowski sentenced to imprisonment for 35 years. Moinet J. Commitment issued.

Respondent's Exhibit "A"—(Continued)

1939

Jan. 27 Subpoena to Ruth McDowell returned served January 23, 1939. Subpoena to R. J. Steward returned served January 20, 1939 filed.

Subpoena to Irene Knickerbocker Arvale Tipper and George Wallgast returned served January 20, 1939 filed.

Subpoena to Bernice Smith, retd served Jan. 23, 1939, Ann Sheridan, Alex Costage and William Ekstein returned served January 21, 1939 filed.

Subpoena Duces Tecum returned served on Howard C. Knickerbocker, January 20, 1939 filed.

Jan. 28 Motion for New Trial as to Walter McDonald. Hearing February 18, 1939 filed. Motion for New Trial as to Otto Barnowski. Hearing February 13, 1939 filed.

Feb. 20 Answer of the US to Motion for New Trial filed. Hearing on Motion for New Trial continued to February 27, 1939.

Mar. 9 Commitment returned executed by delivering Defendants, Walter McDonald & Otto Barnowski, to Warden U.S. Penitentiary, Leavenworth, Kansas, March 3, 1939, filed.

Mar. 13 Order denying Motions for New Trial entered Moinet J.

June 30 Affidavit of Otto Barnowski filed.
Certified copies issued.

Respondent's Exhibit "A"—(Continued)

1939

- July 5 Affidavit of Walter McDonald.
Certified copies issued.
- Oct. 5 Praeceptum for certified copies filed, copies issued.

1943.

- Jan. 13 Verified Motion for Vacation of Erroneous and Void Sentence of Walter McDonald filed.
- June 12 Order Denying Motions of Walter McDonald for vacation of Erroneous and Void Sentence filed and entered. Moinet J. Book 75, Page 234.
- June 14 Petition for Writ of Habeas Corpus ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 75, Page 269.
Writ of Habeas Corpus Ad Prosequendum issued.
- June 30 Petition of Habeas Corpus Ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 76, Page 146.
Writ of Habeas Corpus Ad Prosequendum issued.
- July 15 Defendants Response to Government's Petition to vacate Judgment, etc. filed.
- Aug. 2 Petition of Walter McDonald to vacate Judgment heard in part and continued without date. Defendant waives counsel at this hearing. Moinet J.

Respondent's Exhibit "A"—(Continued)

1943

- Oct. 14 Certified copies of order of C.C.A. directing clerk to file a transcript of Record filed. Moinet J. Book 80, Page 247.
- Oct. 21 Order to set aside Sentence of Walter McDonald led and entered. Moinet J.
Defendant Walter McDonald sentenced to imprisonment under Count 2, for 25 years. Moinet J. Book 80, Page 461.
Commitment issued.
- Oct. 29 Praeceptum for additions to Transcript of Record filed.
- Dec. 7 Writ of Habeas Corpus Ad Prosequendum returned and filed.
Commitment for Walter McDonald returned and filed.

1944.

- Feb. 16 Mandate and Opinion on appeal of Walter McDonald filed. Moinet J. Book 85, Page 30.
- Apr. 3 Petition for Writ of Habeas Corpus Ad Prosequendum filed. Order allowing to be issued entered. Moinet J.
Writ of Habeas Corpus Ad Prosequendum issued for Otto Barnowski—Returnable.
- Apr. 13 Hearing on Petition of Otto Baranowski to reduce sentence, Continued to Apr. 20, 1944, so that defendant may secure counsel. Moinet J.

Respondent's Exhibit "A"—(Continued)

1944

Apr. 20 Hearing on Petition of Otto Baranowski to reduce sentence continued to Apr. 25, 1944. Moinet J.

Order appointing Hugh Francis, Counsel for Otto Barnowski entered. Moinet J. Book, Page [97]

Apr. 25 Motion for Otto Barnowski for correction of sentence filed.

Order setting aside former sentence of Otto Barnowski of Jan. 26, 1939, and sentencing defendant to imprisonment for 25 years to begin on Jan. 26, 1939. Moinet J. Book 87, Page 458.

Commitment issued.

May 2 Writ of Habeas Corpus Ad Prosequendum filed and entered. [98]

United States of America,
Eastern District of Michigan—ss.

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Plea, Verdict, Sentences (2) Docket Entries in the Matter of the United States of America vs. Walter McDonald, et al. Criminal Docket No. 24742 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto sub-

Respondent's Exhibit "A"—(Continued)
scribed my name and affixed the seal of the afore-
said Court at Detroit, Michigan, this 22nd day of
June, A.D. 1944.

[Seal]

GEORGE M. READ,

Clerk.

ELEANOR VAN LOON,

Deputy Clerk. [99]

Department of Justice

Washington

23414

May 15, 1943

To the Warden, U. S. Penitentiary, Leavenworth,
Kansas:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of Walter McDonald, #54615, from the U. S. Penitentiary, Leavenworth, Kansas, to the U. S. Penitentiary, Alcatraz, California.

Now, Therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official

Respondent's Exhibit "A"—(Continued)

in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the Warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,

Director, Bureau of Prisons.

(Signed) FRANK LOVELAND,

Acting Assistant Director.

Safer Custody

Original.—To be left at institution to which prisoner is transferred.

A True Copy.

By C. W. SUNDSTROM,

Record Clerk, USP,

Alcatraz, Calif.

June 19, 1944. [100]

Respondent's Exhibit "A"—(Continued)

(Copy)

23414

Record of Court Commitment
Department of Justice
Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

Inst. Name: Walter McDonald. No. 602-AZ. Born 10-1-90. Age 53.

Alias Walter McDougal, William McDonnell, Walter Perkins. Color: Indian.

True Name: Inst. name.

Name and number of prior commitments to Fed. inst.: 54615-Leavenworth (same offense).

Offense: National Bank Robbery—armed.

District: E-D-Michigan-Detroit.

Sentence: 25 years.

Costs, Fine: None.

Sentence changed: Oct. 21, 1943. New term 25 Yrs. Sentence changed to 25 yrs. by reason therefor new judg. & commitm't.

Sentenced: Jan. 26, 1939 (Original). Oct. 21, 1943 (Re-sentenced).

Committed to Fed. Inst.: March 3, 1939.

Sentence begins: Jan. 26, 1939.

Eligible for parole: May 25, 1947.

Eligible for conditional release with good time: Feb. 6, 1956* (With forfeit).

When arrested: March 28, 1938.

Respondent's Exhibit "A"—(Continued)

Where arrested: Detroit, Michigan.

Residence: Detroit, Michigan.

Time in jail before trial: Since arrest.

Rate per mo. good time: 10. Total good time possible: 3000 days.

Eligible for con. ref. with extra good time: Sept. 29, 1955 (With credit of 130 days industrial good time.

Forfeited good time: November 4, 1942*.

Amount forfeited: *Earned to June 1, 1944: (F) 90 days good time.

Expires full term: January 25, 1964.

Person to be notified in case of serious illness or death:

16674 USDB (Ft. Leav. (Military) Ft. Leavenworth, Kans. Name. Phillip Vincenti.

48704, State Penitentiary, Columbus, Ohio, Relation, Friend.

54458, State Penitentiary, Columbus, Ohio, Address 2709 Mt. Elliott, Detroit, Mich.

(Received at Alcatraz, May 20, 1943, in transfer from USP. Leavenworth, Kans.)

Releases and recommitments on present sentence other than parole:

3/7/41 To Ct. WHC & return.

3/27/41 To Ct. WHC & return.

7/23/43 To Ct. WHC-Detroit.

11/26/43 Returned to AZ.

3/8/39 Ohio Pen, Columbus, Ohio, Parole violation.

[Endorsed]: Filed July 5, 1944.

[Title of Court and Cause.]

TRAVERSE OF RETURN TO ORDER TO
SHOW CAUSE

The above-named petitioner, Walter McDonald, in answer to the return of James A. Johnston, Warden, to the order to show cause respectfully shows:

FIRST

That petitioner is unlawfully detained by Warden James A. Johnston in the United States Penitentiary on Alcatraz Island, California, by color of authority of a void sentence and illegal warrant of commitment rendered and issued without lawful jurisdiction by the United States District Court for the Eastern District of Michigan in a cause numbered 24742. Petitioner avers that said purported sentence and warrant of commitment under date of October 21, 1943, are absolutely void as a matter of law in that petitioner had fully served a former sentence for the same said offense on indictment numbered 24742. Said former sentence was begun on January 26, 1939, and the valid sentence on the only valid count thereof was concluded in May, 1943. (Petitioner's Exhibit A). Said second and unlawful sentence on said indictment numbered 24742 was imposed on October 21, 1943, which began to run "from and including this day." (Petitioner's exhibit B).

The sum of these two sentences exceeds 30 years which is in direct conflict with the applicable statute, 12 U.S.C.A., Section 588B(b). The double

jeopardy phase of this cause is fully treated in petitioners Brief.

Respondent's return to order to show cause substantiates the major averments of your petitioner. However, his minor variations are of lesser import in degree than substance. But the return as a whole reflects with sharp contrast devious circumlocutions to becloud the issue by misstatement of facts which is clearly apparent in the following particularity, to-wit: [102]

—A—

The respondent fails to append any signature to the return to the order to show cause or to verify the same by oath. 28 U.S.C.A. Section 457.

—B—

The respondent avers that the unlawful second sentence was modified by the Sixth Circuit Court of appeals on January 10, 1944. As a matter of truth and fact, to be verified by reference, the Sixth Circuit court of appeals on January 10, 1944, affirmed this said unlawful judgment, 139 F. (2d) 939. Then realizing this affirmance was in direct violation of petitioner's constitutional immunity to double jeopardy, it attempted to justify such extra judicial expediency by a deliberate violation of a Federal Statute in the following manner: McDonald vs. Moinet, 139 F. (2d) 941:

“The petitioner will be entitled to the benefits of all parole regulations and good time credits, as if the valid resentence had been pronounced on January 26, 1939, the date of the original sentence.”

This determination does not alter in the slightest degree the fundamental averment put in issue by petitioner. Its sole significance lies in the amazing fact that such ill advised conclusion is contrary to federal law being in diametric opposition to 18 U.S.C.A., Section 709a, para. 2;

"That with respect to federal prisoners sentenced after this act shall have become effective, deductions from the term of sentence for good conduct—shall be computed beginning with the day on which the sentence Commences to Run. (Emphasis supplied.)

The trial court's unlawful order of commitment dated October 21, 1943, by which petitioner is now illegally imprisoned, clearly and definitely states that the said second sentence begins to run "from and including that day," (Ex. B) October 21, 1943. How then can the Sixth Circuit court of appeals aver that the good time begins to run on the second sentence from January 26, 1939, four years and [103] nine months before said second sentence is imposed, in diametric opposition to 18 U.S.C.A., Section 709a, *supra*.

We do not, however, deem this point of any significance in the issue raised by petitioner's writ of habeas corpus. But respondent alleged that the sixth circuit court of appeals modified said unlawful second sentence. (Even though said second sentence was affirmed.) And this irrelevant point was, unquestionably, the only one to which respondent could have alluded. This analysis necessarily ensued.

—C—

The respondent's exhibit A, No. 4, is a false record and does not conform to the true record of the court commitment, of record October 21, 1943, (Petitioner's Exhibit B) in the following particularities, to wit:

True Record (Court)

Sentenced: Oct. 21, 1943.

Committed: Nov. 26, 1943.

Sentence begins Oct. 21, 1943.

Eligible for Parole: Feb. 21, 1952.

Cond. Release: Nov. 21, 1960 (with forfeit).

Expires full term: Oct. 20, 1968.

Respondent's Record (False)

Sentenced: Oct. 21, 1943 (re-sentenced).

Committed: Mar. 3, 1939.

Sentence begins Jan. 26, 1939.

Eligible for Parole: May 25, 1947.

Cond. Release: Feb. 6, 1956 (with forfeit).

Expires full term: Jan. 25, 1964.

SECOND

The court order of commitment is the only authority by which respondent Warden is empowered to detain a prisoner. By what recognized authority

may he deviate from the precise and express decree and order of the court governing his limited restraint of a prisoner to alter, modify, amend or change said court order which ensued as the logical result of purported lawful judicial process?

It should be noted with significant particularity that the first and second commitments clearly indicate the precise date upon which Each sentence begins to run. They are thus [104] in full concord with the essential requirements of the statute, 18 U.S.C.A., Section 709a, Para. 1. This vital fact clearly indicates the imposition of two separate and distinct sentences; the first of which petitioner has fully served and upon the second of which he is now being unlawfully detained.

CONCLUSION

This court may readily perceive that the various circumlocutions of respondent Warden indicate an attempted concealment of some unlawful proceeding through the effective operation of which, petitioner is being unlawfully detained on a second sentence for the same offense.

Petitioner therefore, earnestly prays this court to scrutinize this unusual cause with considered zeal and study it with particular care that right shall survive and justice prevail; and that the petition for Writ of habeas corpus be granted; and

petitioner be forthwith released from further unlawful custody.

(s) WALTER McDONALD,
Petitioner Pro. Se.

Subscribed and sworn to before me a Notary Public, this 25 day of July, 1944.

Records at U. S. Penitentiary, Alcatraz, California, indicate Walter McDonald is a citizen of the United States.

[Seal] (s) E. J. MILLER,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden—Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed July 26, 1944. [105]

[Title of Court and Cause—No. 23414-S.]

ORDER

After hearing upon a writ of habeas corpus heretofore issued on June 26, 1944, and upon due consideration of the testimony and arguments submitted to the Court for decision,

It Is Hereby Ordered:

1. The application of petitioner to be restored to his liberty is denied.

2. The writ heretofore issued on June 26, 1944, is discharged.

The United States Attorney may submit findings of fact and conclusions of law under the rules.

Dated: August 14, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 16, 1944. [106]

[Title of Court and Cause—No. 23441-S.]

AMENDED ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

It appearing that there was a clerical error in the order of this court in the above proceeding, dated August 14, 1944, the same is, in accordance with the provisions of Rule 60 FRCP, amended as follows:

1. The application of petitioner to be restored to his liberty is denied.
2. The order to show cause issued on June 26, 1944, is discharged.

Dated: August 29, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Sept. 5, 1944. [107]

[Title of Court and Cause—No. 23414-S.]

NOTICE OF APPEAL

Please take notice that the above-named petitioner hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California entered in the office of the clerk of said court on the 16 day of August, 1944, dismissing the petition for writ of habeas corpus herein, and from each and every part of said order as well as from the whole thereof.

WALTER McDONALD,

Pro se Box No. P.M.B. 602,

Alcatraz, California.

Dated August 18, 1944.

[Endorsed]: Filed Sept. 5, 1944. [108]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10882

WALTER McDONALD,

vs.

JAMES A. JOHNSTON, etc.

MANDATE

United States of America—[Seal]

The President of the United States of America

To the Honorable the Judges of the District Court
of the United States for the Northern District
of California, Southern Division, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of California, Southern Division, before you, or some of you, in a cause between Walter McDonald, petitioner, and James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, respondent, No. 23414-S, an order was duly filed on the 16th day of August, 1944, as amended by order filed on the 5th day of September, 1944, which said order is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and [110] as by the inspection of the Transcript of the Record of the said District Court, which was brought into

the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Walter McDonald, as appellant, against James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, as appellee, agreeable to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 6th day of March in the year of our Lord One Thousand Nine Hundred and forty-five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed. (April 2, 1945).

You, Thereby, Are Hereby Commanded that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 31st day of May, in the year of our Lord One Thousand Nine Hundred and forty-five and of the Independence of the United States of America the One Hundred and sixty-ninth.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed May 31, 1945. C. W. Calbreath, Clerk. [112]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 112 pages, numbered from 1 to 112, inclusive, to be a full, true and correct copy of the records and proceedings as enumerated in the Designation of Contents of Record on Appeal in the case entitled Walter McDonald, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary. Alcatraz, California, Respondent, No. 24885 S, on Habeas Corpus, as the same now remain on file and of record in the office of the Clerk of said Court, and that the same constitutes the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of preparing and certifying the foregoing Transcript of Record on Appeal is the sum of \$36.95, of which amount \$35.85 has been charged against the United States of America, and \$1.10 has been paid to me by the Attorney for the Cross-Appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 11th day of December, A.D. 1945.

[Seal] C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk. [113]

[Endorsed]: No. 11210. United States Circuit Court of Appeals for the Ninth Circuit. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Walter McDonald, Appellee, vs. Walter McDonald, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed: December 12, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 11,210

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Appellant,
vs.

WALTER McDONALD,
Appellee.

AMENDED STATEMENT OF POINTS TO BE
RELIED ON IN APPEAL AND DESIGNA-
TION OF CONTENTS OF RECORD TO BE
PRINTED.

James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon by him on appeal:

(1) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he ordered the appellee discharged from the custody of the appellant.

(3) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he found the appellee had been denied the effective assistance of counsel dur-

ing the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. No. 24742;

(4) That the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, erred when he found that the appellee had been denied the effective assistance of counsel during the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. number 24742, without first issuing a writ of habeas corpus and producing the appellee before him for hearing to determine if the facts as alleged by appellee were true and to afford the appellant the opportunity to contravert the facts as alleged by the appellee.

(5) That the sentence imposed against appellee by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, Cr. No. 24742, is a valid, existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

(Signed) FRANK J. HENNESSY,
United States Attorney.

(Signed) JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Appellant.

[Endorsed]: Filed January 29, 1946. Paul P. O'Brien, Clerk.

